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In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (App. A, *infra*, pp. 1A-37A) are reported at 65 T.C. 44. The opinion of the court of appeals (App. B, *infra*, pp. 38A-41A) is reported at 544 F. 2d 686.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 42A) was entered on November 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether cash payments to state police troopers that are in addition to their salary and that are designated as meal allowances are includable in their gross income under Section 61(a) of the Internal Revenue Code of 1954, and not otherwise excludable from income under Section 119 of the Code, which excludes from an employee's gross income the value of meals provided to him by his employer if the meals are furnished on the employer's business premises.

STATUTES AND REGULATION INVOLVED

The relevant provisions of Sections 61(a) and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Treasury Regulations, Section 1.119-1 (26 C.F.R.) are set forth in Appendix D, *infra*, pp. 43A-47A.

STATEMENT

Respondent [1] is a state police trooper employed by the Division of State Police of the Department of Public Safety of the State of New Jersey. During 1970, respondent received a base salary of $8,739.38, and an additional amount of $1,697.54, designated as an allowance for meals.[2] All New Jersey State Police troopers are entitled to the same meal allowance regardless of their length of service (App. A, *infra*, pp. 2A, 4A and n. 2, 5A, 7A-8A).

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[1] References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year at issue.

[2] Although respondent was entitled to $1,704 in meal allowance money, he in fact received $1,697.54. The discrepancy is not relevant (App. A, *infra*, p. 4A, n. 2).

The meal allowance is paid biweekly in advance and is included in the trooper's salary, which is paid for prior periods. The cash allowance for meals is described on a state police recruitment brochure as an item to be received in addition to the base salary. The amount of the meal allowance is a subject of negotiations between the state and the police troopers' union (App. A, *infra*, pp. 4A-5A).[3]

The State of New Jersey instituted the cash meal allowance for its police troopers in July, 1949. Prior to that time, all troopers were provided with meals during their hours of active duty at various meal stations throughout the state. When a trooper was unable to eat at an official meal station, he would eat at a public restaurant and obtain reimbursement from the state. The meal station system proved to be unsatisfactory because the troopers consumed too much time in traveling from their duty posts to the nearest meal station and thereby left their posts unguarded. As a result, the state closed its meal stations and established a cash allowance system, in accordance with the practice adopted by several neighboring states (App. A, *infra*, pp. 3A-4A).

Under the cash meal allowance system, troopers are expected to eat within their assigned patrol area. They must first check in with the officer in charge of their assignment station and request permission to eat. Troopers are subject to call during their meal period. Thus, a trooper must advise the officer in charge where he may be reached while eating (App. A, *infra*, p. 5A).

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[3] The meal allowance for troopers was originally set in 1949 at $70 per month, with adjustments made for those officers who were not on active duty (App. A, *infra*, p. 4A).

The state places no restrictions on the use of the cash meal allowances provided to the police troopers. They are not required to account to the state for their meal expenses. A trooper may eat at home if he lives within his assigned duty area, eat in a public restaurant, or bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals (App. A, *infra*, p. 5A).

On his 1970 income tax return respondent reported $9,066 in wages. That amount included his base salary of $8,739.38 and cash meal allowances of $326.45. The state included the latter amount on respondent's Wage and Tax Statement (Form W-2) for the year. However, respondent did not include in income the remaining $1,371.09 meal allowance on his return.[4] He also claimed a deduction of $405 for food maintenance expenses (App. A, *infra*, pp. 7A-8A).

On audit, the Commissioner of Internal Revenue disallowed respondent's claimed deduction for food maintenance expenses. After discovering that respondent had not reported as income the remaining $1,371.09 of cash meal allowances, the Commissioner determined that such amount was properly includable in respondent's gross income and accordingly increased the deficiency (App. A, *infra*, p. 8A).[5]

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[4] The state began to withhold income tax from the cash meal allowances paid to the troopers as of October 1, 1970. Hence, only $326.45 of the total $1,697.54 was reported on respondent's 1970 Wage and Tax Statement (App. A, *infra*, p. 7A, n. 3).

[5] The Commissioner raised the issue of includability of the cash meal allowances by amending his answer in the Tax Court. See Section 6214(a) of the Internal Revenue Code of 1954 (App. A, *infra*, p. 8A).

In a reviewed decision, the Tax Court held, with six dissents, that the cash meal payments were includable in respondent's gross income under Section 61(a) of the Internal Revenue Code of 1954 (App. A, *infra*, pp. 8A-19A). In so holding, the court relied upon the broad statutory definition of "gross income" in Section 61(a), which provides that "[e]xcept as otherwise provided, • • • gross income means all income from whatever source derived • • •." In the Tax Court's view, its conclusion followed from the decisions of this Court holding that by broadly defining gross income, Congress intended to "tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (App. A, *infra*, p. 12A).

Moreover, the Tax Court unanimously held that the cash payments did not qualify for the exclusion from gross income under Section 119 of the Code (App. A, *infra*, pp. 19A-24A). That statute provides for an exclusion from gross income for the value of any meals furnished to an employee by his employer for the convenience of the employer, but only if the meals are furnished on the business premises of the employer. In the Tax Court's view, the meal allowances were not excludable under Section 119 because they were cash payments and not meals furnished in kind. It therefore found it unnecessary to consider whether the payments met the other prerequisites of Section 119 (App. A, *infra*, p. 19A).[6]

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[6] The Tax Court also held that respondent could deduct two-thirds of the meal allowance as a business expense because he was "away from home" within the meaning of Section 162(a)(2) of the Code (App. A, *infra*, pp. 24A-26A). The Commissioner did not appeal that aspect of the Tax Court's decision and it is no longer at issue.

The court of appeals reversed *per curiam* (App. B, *infra*, pp. 38A-41A). In concluding that the cash meal allowances were not includable in the statutory definition of gross income, the court adhered to its prior decision in *Saunders* v. *Commissioner*, 215 F.2d 768, reversing 21 T.C. 630, in which it ruled in favor of the New Jersey State troopers with respect to the same cash payments. The court further held that the payments were excludable from income under Section 119, stating: "We • • • align ourselves with the Fifth, Eighth, and Tenth Circuits" (App. B, *infra*, p. 41A).[7]

REASONS FOR GRANTING THE WRIT

1. In holding that cash payments to state police troopers that are designated as meal allowances are not "gross income" within the meaning of Section 61(a) of the Internal Revenue Code of 1954, and are in any event excludable under Section 119 of the Code, the decision of the court of appeals squarely conflicts with *Wilson* v. *United States*, 412 F.2d 694 (C.A. 1). There, the court ruled that such payments were taxable, "start[ing] with the proposition," rejected by the decision below, "that all remuneration received for services is gross income unless it falls within a specific exclusion" (*id.* at 695). Although the First Circuit in *Wilson* acknowledged that *Saunders* v. *Commissioner*, 215 F.2d 768 (C.A. 3), to which the court below adhered, was to the contrary, it refused to follow it (412 F.2d at 697).

The decision below further conflicts with *Wilson* on whether cash payments designated as meal allowances are excludable from gross income under Section 119. *Wilson*

[7] *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8); and *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10).

held that Section 119 is limited to meals served in kind on the employer's business premises. Here, however, the court of appeals "align[ed] [itself] with the Fifth, Eighth, and Tenth Circuits" (App. B, *infra*, p. 41A), which have ruled that Section 119 covers cash payments for meals. See *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8); *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10). In holding to the contrary, the First Circuit in *Wilson* refused to follow the decisions of these three other circuits, stating "[w]ith due respect, we do not find them persuasive" (412 F.2d at 697).

The question of the taxability of these cash meal allowances is of considerable administrative importance. We are advised by the Internal Revenue Service that 15 states currently make such payments to 10,301 police troopers in the annual amount of approximately $10,000,000. Moreover, the statute of limitations remains open for audit of the troopers of four other states which have only recently discontinued a meal allowance system. Finally, there are 2,193 cases involving this issue presently pending administratively in the Internal Revenue Service with $4,518,573 in taxes at stake.[8] This Court should resolve the conflict

[8] The issue is presently awaiting decision in one court of appeals (*Koerner* v. *United States*, 404 F. Supp. 1128 (S.D. W. Va.), on appeal to C.A. 4, No. 76-1495, argued December 9, 1976), and in two district courts (*Friar* v. *United States*, Civ. No. 75-CV-139-C, W.D. Mo., and *Cronin* v. *United States*, Civ. No. H-75-270, D. Conn.). In *Smith* v. *United States*, No. 75-1609, decided December 13, 1976, the Fifth Circuit reaffirmed its holding in *United States* v. *Barrett*, 321 F.2d 911, that such cash payments were excludable under Section 119. We are advised by the Clerk of the Fifth Circuit that the court has delayed entering judgment in *Smith* pending its disposition of the taxpayer's motion to assess attorney's fees and costs.

among the circuits in order to establish a uniform rule for the tax treatment of such cash payments for meals.

2. The court of appeals' holding that the payments were not includable in gross income seriously erodes the fundamental principle of our tax law that reimbursement or payment of non-deductible personal expenses by an employer represents taxable compensation to the employee. See, *e.g., Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 729-730. If the decision below is permitted to stand, it will invite further attempts by employers to provide tax-free compensatory payments to employees to defray the costs of meals or other personal living expenses. Thus, while the revenue impact of the cash meal allowances to state police troopers is itself substantial, any narrowing of the statutory concept of gross income in the employee compensation area threatens revenue losses of far greater proportions.

Section 61(a) of the Internal Revenue Code provides that "[e]xcept as otherwise provided • • •, gross income means all income from whatever source derived • • •." As this Court has repeatedly observed with respect to its comparable statutory predecessors, this language was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U.S. 331, 334; *Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U.S. 216, 223; *Douglas* v. *Willcuts*, 296 U.S. 1, 9; *Irwin* v. *Gavit*, 268 U.S. 161, 166. The broad catch-all phrase "from whatever source derived," which first appeared in Section II(B) of the Revenue Act of 1913, 38 Stat. 114, 167, shows that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature." *Commissioner* v.

Glenshaw Glass Co., 348 U.S. 426, 429-430. Thus, the Court has consistently recognized that it was "the intention of Congress to tax all gains except those specifically exempted" (*ibid.*). See also *Commissioner* v. *Lo Bue*, 351 U.S. 243, 246.

Here, there can be no doubt that the unrestricted cash payments to the state police troopers fall within the broad reach of the statutory definition of "gross income." They were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra*, 348 U.S. at 431.

Moreover, the cash meal allowances were characterized in a recruitment brochure as an item to be paid in addition to the base salary, and were subject to negotiations between the state and the troopers' union (App. A, *infra*, pp. 4A-5A). As the Tax Court observed, the payment "was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source" (App. A, *infra*, p. 13A). Since the statutory definition of gross income "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected" (*Commissioner* v. *Smith*, 324 U.S. 177, 181), the court of appeals erred in concluding that the cash meal allowances were not part of respondent's gross income.

While the court of appeals adhered to its prior pre-1954 Code decision in *Saunders* v. *Commissioner, supra*, 215 F.2d 768 (C.A. 3), involving the same New Jersey police troopers, the Tax Court majority correctly recognized (App. A, *infra*, pp. 10A-19A) that *Saunders* necessarily conflicts with this Court's broad construction of the statutory defi-

nition of gross income. *Saunders* was decided prior to this Court's holdings in *Glenshaw Glass Co.* and *Lo Bue.* More importantly, the "convenience of the employer" rationale of the Regulations under the 1939 Code,[9] upon which *Saunders* rests, is now confined exclusively to Section 119, which was added at the time of the 1954 codification. If, as we submit, the cash payments are not excludable under Section 119, they cannot escape taxation on the ground that they are not gross income within the meaning of Section 61(a). *Saunders* therefore is no longer a viable precedent.

3. The court of appeals' holding that the cash payments designated as meal allowances are excludable under Section 119 is equally erroneous. That provision permits the exclusion from an employee's gross income of "the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer * * *." The use of the terms "value" and "furnished" shows that the statute requires meals to be furnished in kind. The pertinent legislative history reinforces that conclusion. Thus, the Senate Finance Committee Report stated (S. Rep. No. 1622, 83d Cong., 2d Sess. 190-191 (1954)): "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation." Accord: Treasury Regulations, Section 1.119-1(c)(2), Appendix D, *infra*, p. 46A.

[9] See Treasury Regulations 111, Section 29.22(a)-3.

In light of the statutory language and the legislative history, the cash allowances at issue here cannot qualify for exclusion under Section 119. Cash payments are not, under any stretch of the imagination, meals furnished in kind. Moreover, since the troopers consumed these meals in various public restaurants, the statutory requirement that the meals be furnished on the business premises of the employer was not met. See *Dole* v. *Commissioner*, 43 T.C. 697, 707-709 (Raum, J., concurring), affirmed, 351 F.2d 308 (C.A. 1). As the First Circuit observed in *Wilson* v. *United States, supra*, 412 F.2d at 697, in holding that such payments were neither meals in kind nor furnished on the employer's business premises, "[t]hus we have a case where history, sense and language all coincide."[10] The rejection of the plain statutory language and its legislative history by the decision below calls for review by this Court.

[10] The congressional intention to exclude cash allowances from the coverage of Section 119 is further demonstrated by the enactment of Section 120 in 1954. That latter provision permitted police officers to exclude from income subsistence allowances not in excess of $5 per day. However, in 1958, Congress repealed Section 120 (see Section 3 of the Technical Amendments Act of 1958, 72 Stat. 1606, 1607) in order "to bring the tax treatment of subsistence allowances for police officials into line with the treatment of such allowances in the case of other taxpayers * * *" (H.R. Rep. No. 775, 85th Cong., 1st Sess. 7 (1957)). If, as the decision below holds, such payments are excludable under Section 119, the repeal of Section 120 would be ineffective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1977.

APPENDIX A

65 T. C. No. 5

UNITED STATES TAX COURT

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 112-73. Filed October 14, 1975.

Held: Amount advanced to petitioner, a New Jersey State trooper, as a meal allowance is includable in his income under sec. 61, I.R.C. 1954, and is not excludable under sec. 119, I.R.C. 1954 since the amount was paid to him in cash. *Saunders v. Commissioner,* 215 F. 2d 768 (3d Cir. 1954), reversing 21 T.C. 630 (1954), is not controlling since it involved years prior to the addition to the Code of sec. 119 providing for exclusion from income of the value of meals furnished for the convenience of the employer on the business premises of the employer.

Held, further, Petitioner is entitled to deduct the amount he spent for meals while away from home overnight in his duties as a trooper which amount is determined from the facts to be $1,136.

Carl D. Cordes, Herrick K. Lidstone, and *Richard Kilcullen,* for the petitioners.

Irwin R. Cohen, for the respondent.

SCOTT, *Judge*: Respondent determined a deficiency in petitioners' Federal income tax for the taxable year 1970 in the amount of $330.70. The issue in controversy is whether $1,697.54 received by petitioner Robert J. Kowalski from the State of New Jersey as a food maintenance allowance constitutes gross income under section 61, I.R.C. 1954;[1] or, if the above amount does constitute gross income, whether it is properly excludable from gross income under section 119; or failing these two, whether petitioners can properly claim an ordinary and necessary business expense deduction under section 162(a)(2) for these amounts.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by this reference.

Petitioners, Robert J. Kowalski (hereinafter petitioner) and Nancy A. Kowalski, are husband and wife residing in Clark, New Jersey, at the time of the filing of their petition herein. Petitioners filed a joint Federal income tax return with the Internal Revenue Service Center, Philadelphia, Pennsylvania, for the calendar year 1970.

Petitioner, at all times relevant herein, was a trooper with the Division of State Police of the Department of Law and Public Safety of the State of New Jersey (hereinafter

[1] All statutory references are to the Internal Revenue Code of 1954 as amended unless otherwise indicated.

NJSP or state police). He originally joined the NJSP in August 1960 and was reenlisted in 1962 and 1964. During his second term he received tenure, and at all times petitioner was a trooper in good standing with the NJSP.

The NJSP, created by act of the New Jersey legislature on March 29, 1921, is responsible statewide for all police functions and has primary responsibility in those areas of the state not within the jurisdiction of local authority. It also assists local police departments in the administration of their affairs.

The executive and administrative head of the NJSP is the Superintendent of State Police (hereinafter Superintendent). He is appointed by the Governor of the state. The Superintendent, with the approval of the Governor, makes all rules and regulations for the discipline and control of the state police. The Superintendent is authorized to provide for the payment of commutation of rations and quarters (hereinafter meal allowance) to those members of the state police not provided with rations and quarters by the state.

The NJSP, organized along military lines, is headed by the Superintendent who holds the rank of colonel. Below him in rank is the Deputy Superintendent who has the statutory rank of major. The remainder of the state police is comprised of men with the statutory ranks of captain, lieutenant, sergeant, and trooper. In 1970 there were approximately 1,500 people in the NJSP, of whom approximately 900 were troopers.

Prior to July 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the state. In those instances where a trooper was unable

to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the state. Despite various efforts at enforcing this system, it proved unsatisfactory. Troopers would have to leave their posts for approximately an hour and a half to eat these meals leaving their patrol areas unguarded. Efforts aimed at staggering these eating periods proved unworkable and drew complaints from the individuals in charge of the eating stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the state discontinued its meal operations and instituted a meal allowance system.

This system provided for a daily meal allowance for all members of the state police while they were on active duty. The meal allowance for troopers was set at $70 per month with adjustments made for various non-active duty situations. By January 1970 the meal allowance rate for troopers was $1,704 per year,[2] and by July 1970 this amount was paid without adjustment except for leave for military training. The meal allowance is paid biweekly in advance and is included, although separately stated, with the trooper's salary which is paid in arrears. The meal allowance money is also separately accounted for in the state police's accounting system. Funds are never co-mingled between the salary and meal allowance accounts. All troopers are entitled to the same meal allowance regardless of years in

[2] Although petitioner was entitled to $1,704 in meal allowance money for the calendar year 1970, the amount in issue is only $1,697.54. This slight difference is not relevant to the question at hand.

service or the actual amount of time spent on active duty. Their salaries increase with their length of service.

This system was adopted to provide the state and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation.

Under this system the troopers are expected to eat at a public eating place within their assigned patrol area. They must first check in with the officer in charge of the station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating and is subject to call during the eating period. Such calls are not an uncommon experience. Troopers are not permitted to accept any free meals.

There are no restrictions placed on the use of the meal allowance provided to the troopers. They are not required to account to the state for their meal expenses. A trooper may eat at home if it is within his assigned patrol area, or he may bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals.

On the advertising brochure the meal allowance is described as an item to be received in addition to the base salary. State police recruits are told that the meal allowance will be paid to them in cash and is in lieu of the furnishing of meals they are required to eat while they are on active duty. The meal allowance is also a subject of negotiations between the state and the troopers' union.

Petitioner, in a normal 30-day month, is on active duty 390 hours and is on duty leave 330 hours. The duty leave

hours are composed of 6 days off, 10 overnight passes of 15 hours each, and 9 passes of 4 hours each. A trooper is on active duty when he is in uniform performing his official duties. A trooper, however, is on call 24 hours a day and his actual active duty time is determined by the manpower needs of the station to which he is assigned.

It is the policy of the state police to give every man a broad scope of experience by giving him various assignments as operations permit. During calendar year 1970 petitioner had several different assignments.

From January to March 9, 1970 petitioner was assigned to a radar team on the New Jersey Turnpike. He worked a shift, was required to eat his meals on the turnpike, and slept at his then home in Linden, which was approximately 13 miles from his station in Newark.

From March 9 through May 7, 1970, petitioner was assigned to perform general police field duties out of the Highstown Barracks in central New Jersey which is approximately 42 miles from his home in Linden. While there petitioner was required to sleep at the barracks. His normal active duty period consisted of two consecutive 24-hour periods. During this period petitioner would perform his field patrol duties plus any follow-up investigative work that occurred. A normal duty day consists of approximately 16 to 18 hours of work. Petitioner generally ate his meals in a public restaurant in his assigned area. Cooking facilities were available if he was allotted time to purchase and prepare his own meal. During this tour of duty petitioner was assigned on two occasions to riot duty of approximately 5 days duration each. On each occasion he was on 24-hour duty, eating and sleeping when and where possible.

From May 7 through June 28, 1970, petitioner was assigned to screen the applications of prospective recruits for the state police. He worked from his home, traveling throughout the state interviewing people in connection with the recruit's application. During this period petitioner slept at home but ate his meals primarily on the road.

From June 28 through the end of the year petitioner was reassigned to the Highstown Barracks for general police duties. On several occasions he was given special assignments consisting of riot duty, stand-by status for riot duty, participation in vice raids, observing at state police headquarters, and mandatory in-service training. He did not, in any of these situations, sleep at home or at the Highstown Barracks.

Petitioner was required to keep a record of his activity for each 24-hour period. Based on these records petitioner spent 200 nights away from home on active duty. While on active duty he spent approximately $2 for breakfast, $3 for lunch, and $5 for dinner. Petitioner, in 1970, spent his entire amount of meal allowance received for meals while on active duty.

Petitioner, on his 1970 tax return, reported $9,066 in wages and salaries. Included in this figure is petitioner's base salary of $8,739.38 and meal allowance of $326.45.[3] He

[3] From January through September 30, 1970, federal income tax was not deducted and withheld from the meal allowance paid to the troopers based on *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954), reversing 21 T.C. 630 (1954). In October 1970 the state began to deduct and withhold the appropriate amounts after correspondence and discussions with the respondent. Consequently the sum of $326.45 was included on petitioner's Wage and Tax Statement (Form W-2) for the year 1970.

did not include the remaining $1,371.09 of meal allowance in the tax return. Petitioner claimed as a miscellaneous itemized deduction $405 of food maintenance expenses.[4] Respondent disallowed this deduction determining that the meal allowance funds were includable as taxable income under section 61 and calculated a deficiency of $69.54.

Subsequently, respondent discovered that the remaining $1,371.09 of meal allowance funds received by petitioner in 1970 was not included in petitioner's tax return. Respondent filed an Amendment to Answer of petitioner's petition, to which the petitioner did not object, determining that this amount should also be included in gross income. Respondent accordingly increased the deficiency to $330.70. Included in this increase is an amount attributable to a reduction in petitioner's medical expense deduction caused merely by the increase in petitioner's adjusted gross income.

Opinion

Petitioner's primary position in this case is that the monthly amount he received does not constitute gross income under section 61(a). In the alternative petitioner contends that if the monthly allowance does constitute gross income, it is properly to be excluded under section 119 or, if not excludable under that section, is deductible as an ordinary and necessary business expense under section 162(a)(2).

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[4] Although there is a minor difference between the food maintenance allowance included as salaries and wages in the tax return as income and the amount of the deduction taken by petitioner, respondent does not dispute the correctness of the amount claimed as a deduction.

In support of his contention that the monthly allowance is not income under section 61(a), petitioner relies primarily on the decision of the United States Court of Appeals for the Third Circuit, to which an appeal in this case would lie, in *Saunders v. Commissioner,* 215 F. 2d 768 (3rd Cir. 1954), reversing 21 T.C. 630 (1954), decided September 22, 1954. In fact, petitioner argues that under our holding in *Jack E. Golsen,* 54 T.C. 742 (1970), affd. 445 F. 2d 985 (10th Cir. 1971), cert. denied 404 U.S. 940 (1971), we are bound to follow the decision of the Third Circuit in the *Saunders* case.

As petitioner points out, the Third Circuit in the *Saunders* case concluded that cash rations payments received by New Jersey state policemen under circumstances not substantially different from those involved in the instant case were not required to be included in gross income under section 22(a), I.R.C. 1939, the predecessor section of section 61(a). In reaching this conclusion, the court considered first whether the cash payment to defray the cost of meals was furnished to state policemen by the State of New Jersey for the "convenience of the employer," and having concluded that it was, proceeded to discuss whether it was properly excludable under the rationale of the regulations excluding from gross income quarters or meals furnished to employees for the convenience of the employer. In that case the court concluded that the "rationale of the rule should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof." The court pointed out that "[a]dmittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind," but that, "an

employee may be furnished cash which is not compensation." The court then stated, at 772:

> In the past, the Bureau has recognized that cash received by an employee for similar purposes may not be compensation: in O.D. 11, 1 Cum.Bull. 66 (1919), it was held that an American Red Cross employee receiving maintenance but no pay should return as income only the excess of the amount received over his actual living expenses; and in O.D. 514, 2 Cum. Bull. 90 (1920), it was ruled that supper money furnished an employee working after regular hours and not considered as compensation was furnished for the convenience of the employer and was not taxable. Likewise, the courts have considered maintenance furnished in kind and in cash on the same basis for determining an individual's taxable compensation. In Jones v. United States, 1925, 60 Ct. Cl. 552, it was held that neither the value of living quarters furnished or cash in lieu of quarters paid an army officer were income; and citing the Jones case, it was stated in Bercaw v. Commissioner, 4 Cir. 1948, 165 F. 2d 521, at page 524: "This conclusion [that payments by an army officer for meals and 'striker' service are not deductible for tax purposes] is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation." • • •

The *Saunders* case was decided under the provisions of the 1939 Code which contained no statutory exclusion from gross income for meals and lodging and was decided prior to the decisions of the Supreme Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), and *Commissioner v. Lo Bue*, 351 U.S. 243 (1956), which as hereinafter

discussed amplified prior decisions concerning the Congressional intent in defining gross income to include "all income from whatever source derived" except as otherwise provided by statute. For these reasons, we conclude that the *Saunders* case is not controlling here and under our holding in the *Golsen* case we are not required to follow it.

In our view the Third Circuit in *Jacob v. United States*, 493 F. 2d 1294, 1297 (3rd Cir. 1974), has recognized the distinction in those cases involving claimed exclusion from gross income arising under the 1939 Code and the 1954 Code. In *Jacob v. United States, supra*, the Third Circuit held that a doctor required to reside on the premises of an institution for mentally retarded persons to be available on a 24-hour per day basis was entitled to exclude under section 119 the value of groceries provided him by his employer as "meals" furnished to him. In reaching its conclusion, the court referred to "the so-called 'state trooper' cases," holding cash allowances to be excludable under section 119, although it recognized that these cases were "not exactly in point." One of the so-called "state trooper" cases cited was the *Saunders* case, the following footnote being made to the citation:

> *Saunders, supra,* involved facts arising prior to 1954 when section 119 was added to the Internal Revenue Code, but the reasoning of *Saunders* was followed in the above-cited post-1954 cases.

This note by the Third Circuit is a recognition that the law applicable to years governed by the 1939 Code differs from the law applicable to years governed by the 1954 Code, and that the *Saunders* case is not "squarely in point" with cases governed by the 1954 Code.

Section 61(a) states that "except as otherwise provided in this subtitle, gross income means all income from whatever source derived, • • •." The broadness of this definition has on numerous occasions been recognized by the Supreme Court. In *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429-430 (1955), the Court stated:

> But Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted. *Commissioner v. Jacobson*, 336 U.S. 28, 49, 69 S. Ct. 358, 369, 93 L.Ed. 477; *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87-91, 55 S. Ct. 50, 51-53, 79 L.Ed. 211. • • •

Shortly thereafter in *Commissioner v. Lo Bue*, 351 U.S. 243, 246 (1956), the Court pointed out that it had "repeatedly held that in defining 'gross income' as broadly as it did • • • Congress intended to 'tax all gains except those specifically exempted.'"

In the instant case, even though petitioner's employer, the State of New Jersey, furnished the meal allowance to state troopers because it was more convenient to provide a meal allowance than to provide meals for these troopers and because in many instances the proximity of troopers to the area in which their work was being conducted saved time of the troopers in eating meals, the allowance was paid for food for the troopers which otherwise the troopers would have found it necessary to provide for themselves. Also, it is clear that petitioner would have been permitted to bring his lunch and eat it in or near his patrol car and still receive the same meal allowance. Even though we have

found that the meal allowance was not intended as additional compenation, it was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source. We conclude, under section 61, that "except as otherwise provided" in the income tax law, the meal allowance received by petitioner is includable in his gross income. See *United States v. Woodall*, 255 F. 2d 370 (10th Cir. 1958).

In the *Saunders* case, the court recognized that the definition of "gross income" in the taxing statutes was broad, but relying on the long history of meals furnished for the convenience of the employer being excluded from income of taxpayers and the Commisioner's regulations so providing, concluded that there was in fact an exclusion in the income tax laws from gross income for meals or their equivalent furnished for the convenience of the employer. Such an exclusion is now provided in section 119 where the requirements of that section are met.

Petitioner argues that the legislative history of section 119 shows that Congress did not intend to change the "pre-existing law" with respect to cash payment for meals as set forth in the *Saunders* case when section 119 was enacted dealing with the exclusion of meals and lodging from gross income. We do not so interpret this legislative history but rather interpret it to indicate that the only exclusion for meals and lodging intended by Congress to be available to any taxpayer other than members of the Armed Forces after the enactment of the 1954 Code were meals and lodging excludable under the provisions of section 119. The effective date of the enactment of the 1954 Code which contained for the first time any provisions for

exclusion of meals and lodging furnished for the convenience of the employer was August 16, 1954. Obviously, the committee reports all preceded the effective date of the 1954 Code, which on that date had been enacted by Congress and signed by the President. The decision of the Third Circuit in *Saunders v. Commissioner, supra,* as above noted was entered on September 22, 1954, over a month after the final enactment of the 1954 Code.

Section 119 in a form different from its final enactment appeared in the House version of H.R. 8300, which when enacted was the Internal Revenue Code of 1954. H.R. Rept. No. 1337, 83d Cong., 2d Sess. (1954), to accompany H.R. 8300, stated as follows with respect to section 119:

> *Section 119. Meals or lodging furnished for convenience of employer*
>
> This section provides a statutory test for determining the extent to which an employee may exclude from gross income the value of meals or lodging furnished by the employer.
>
> Existing law, as currently interpreted by the Internal Revenue Service and by certain court decisions requires that if meals or lodging represent compensation the value thereof must be included in gross income, even though the employee must accept such meals or lodging in order properly to perform his duties.
>
> Under section 119, if meals or lodging (1) are furnished at the place of employment, and (2) are required to be accepted by the employee at the place of employment as a condition of his employment, the value thereof shall be excluded from gross income, notwithstanding the fact that such meals or lodging represent additional compensation to the employee.

> However, if the two foregoing requirements are not met, the value of any meals or lodging furnished the employee must be included in his gross income to the extent that they constitute compensation. This section applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowances represent compensation.

The Senate Finance Committee Report changed the provision of the House bill to the provision that now appears in section 119, S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong. 2d Sess. (1954), explains the change as follows:

> *Section 119. Meals and lodging furnished for convenience of employer*
>
> This section corresponds to section 119 of the bill as passed by the House. Existing law, as currently interpreted by the Internal Revenue Service and certain court decisions, requires that if meals or lodging represent compensation the value thereof must be included in gross income even though the employee must accept such meals or lodging in order properly to perform his duties. Under section 119 of the bill as passed by the House if meals or lodging are (1) furnished at the place of employment, and (2) are required to be accepted by the employee at the place of employment as a condition of the employment, the value thereof is excludable from the employee's gross income. Under section 119 as amended by your committee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation. In the case

of meals the exclusion is permitted only if the meals are furnished on the business premises of the employer. In the case of lodging the exclusion is permitted only if the employee is required to accept the lodging on the business premises of the employer as a condition of his employment. The phrase "required as a condition of his employment" means required in order for the employee to properly perform the duties of his employment.

Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation.

In the Conference Report, the Senate version of the bill was adopted. The statement in the House Report that "any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowances represent compensation" and the statements in the Senate Report that "[s]ection 119 applies only to meals or lodging furnished in kind" and that "therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation" must therefore be viewed in the light of the case law prior to the decision in the *Saunders* case.

As we pointed out in our opinion in *Robert H. Saunders*, 21 T.C. 630, 634, which was decided on January 29, 1954, while the enactment of the 1954 Code was under active consideration in Congress,

There are numerous cases in which it has been held that subsistence and quarters furnished in kind to an employee did not result in realization of income but the *Jones* case, *supra*, [*Jones v. United States*, 60 Ct. Cl. 552 (1925)] which dealt with cash allowances paid an Army officer in commutation thereof, [meals and lodging] appears to be the only one in which it has been held that such cash allowances were not income. This Court specifically distinguished that case in *Gunnar Van Rosen*, 17 T.C. 834, 839-840, to wit:

> while the *Jones* case is authority for the exclusion from gross income by military personnel of cash allowances made to them for subsistence and quarters, it does not, in our opinion, require or justify an extension of the rule therein to similar allowances made to civilian personnel.

Therefore, at the time the enactment of section 119 was under consideration, the only situation in which a cash payment had been considered in a court case to be excludable from gross income was the cash payment to Army personnel in lieu of quarters and rations.[5]

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[5] There were, of course, outstanding the two rulings referred to in *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954) but these were only rulings of the Revenue Service involving special situations. The Commissioner does at times, by ruling, permit the exclusion from income of items without basis in case law. Prior to a statutory provision for a *deduction from gross income* of certain moving expenses, the Commissioner ruled in Rev. Rul. 54-429, 1954-2 C.B. 53, that where an employee is transferred from one permanent duty station to another, reimbursement received for cost of moving himself, his immediate family, and his household goods is not includable in income. This ruling specifically modified prior rulings that amounts paid by the Government for transportation of the families of Army Officers (O.D. 1135, 5 C.B. 174 (1921)) and of dependents of officers and men of the Coast Guard

In our view the explanation of section 119 that "any cash allowances for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowances represent compensation" was made in the committee reports in the light of the knowledge that the only situation in which such cash allowances had not, under existing law, been held to be includable in income as representing compensation was in the case of military personnel.

Soon after the decision in *Jones v. United States,* 60 Ct. Cls. 552 (1925), the exclusion of the cash allowances for quarters and rations from income of military personnel was written into respondent's regulations and a comparable provision has been included in the regulations since that time.

In our view the lengthy discussion of whether under section 119, the "value of meals" could properly be interpreted to include the value of groceries cooked into meals on the employer's premises in the opinion of the Third Circuit in *Jacob v. United States, supra,* in effect is a recognition that section 119 is the only basis for excluding the value of meals and lodging from the income of a taxpayer other than a member of the Armed Forces since the

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(I.T. 3022, C.B. XV-2, 76 (1936)) from one permanent duty station to another is additional compensation to the recipient. I.T. 3022 relied on our holding in *Leland D. Webb,* 1 B.T.A. 759 (1925), that a Naval Officer could not deduct the cost of transportation of his wife from one permanent duty station to another. Rev. Rul. 54-429 cites no change in case law but merely a change in position by the Commissioner. Compare O.D. 514, 2 C.B. 90 to *Darrell Spear Courtney.* 32 T.C. 334, 344-345 (1959) and cases there cited.

enactment of the 1954 Code. Otherwise, having concluded that the groceries were furnished to the taxpayer in the *Jacob* case for the convenience of the employer, the court could merely have cited its opinion in the *Saunders* case and the discussion of the provisions of section 119 and the regulations issued thereunder would have been unnecessary.

Since we have concluded that the meal allowance paid to petitioner in this case is includable in his gross income under section 61(a), it is necessary to consider whether the allowance is excludable under section 119.[4] That section provides for the exclusion from the gross income of an employee of "the value of any meals" furnished to him by his employer for the convenience of the employer. Section 1.119-1(c)(2) of respondent's regulations provides that "the exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee." It was this provision of the regulations, as well as the statutory provision referring to the "value" of meals that was under consideration in the *Jacob* case.

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[4] SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

As the court pointed out in the *Jacob* case, and as we pointed out in *Burl J. Ghastin*, 60 T.C. 264, 269-270 (1973), the courts of appeals for several circuits have held cash allowances to state troopers to be excludable from the trooper's gross income under section 119 where the Court considered the cash allowances to be furnished for the convenience of the employer. *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963), affirming 205 F. Supp. 307 (S.D. Miss., 1962); *United States v. Morelan*, 356 F. 2d 199 (8th Cir., 1966), affirming 237 F. Supp. 879 (D. Minn. 1965); *United States v. Keeton*, 383 F. 2d 429 (10th Cir. 1967), affirming 256 F. Supp. 576 (D. Colo. 1966).

The district court opinion in the *Barrett* case had held the cash payments not to constitute income under section 61 without citation of cases but merely with the statement (205 F. Supp. at 308):

> The Congress has not seen fit to enact a statute making such money income. The Commissioner cannot, under the guise of an interpretation, enlarge upon a tax statute and create a tax incident where none otherwise exists.

The Fifth Circuit after reciting the fact that the district court held the amounts paid to the Mississippi highway patrolmen for reimbursement for the cost of meals purchased while on duty not to be includable in their gross to discuss the case and affirmed it on the reasoning that the income and stating, "we affirm," proceeded in its opinion amounts of the cash payments were excludable under section 119.

We pointed out in *Burl J. Ghastin, supra*, that the facts in *Barrett, Morelan,* and *Keeton* each differed. The facts in each of those cases differ somewhat from the facts in the instant case and the facts in *Ghastin* have some difference from the facts in the instant case. However, if we accepted the common holding of the *Barrett, Morelan,* and *Keeton* cases, that the words, "value of meals" as used in section 119 include a cash allowance for meals, we would then have to consider whether all the other aspects of section 119 were met in the instant case so as to entitle petitioner to exclude from income the cash allowance he received from the State of New Jersey. In the *Ghastin* case we stated that in our view "meals" as used in section 119 was properly interpreted in *Wilson v. United States*, 412 F. 2d 694, 697 (1st Cir. 1969), affirming 292 F. Supp. 195 (D. N.H. 1968), to refer to meals furnished in kind. We stated our agreement with the holding in the *Wilson* case that the legislative history clearly supported the interpretation that section 119 applied only to meals furnished in kind.

In the *Jacob* case the Third Circuit followed its citation of the *Keeton, Morelan,* and *Barrett* cases with "but see *Wilson v. United States*, 412 F. 2d 694 (1st Cir. 1969)," but did not state its view as to which interpretation of section 119 it considered proper, merely concluding that those cases were not strictly in point. The issue considered by the Third Circuit in the *Jacob* case was considered by that court to be comparable to the issue in *Michael A. Tougher, Jr.*, 51 T.C. 737 (1969), affirmed per curiam 441 F. 2d 1148 (9th Cir. 1971), in which this Court held that an FAA employee living on a remote island in the Pacific Ocean

was not entitled to exclude from gross income the value of groceries furnished from an FAA commissary since such groceries did not constitute meals within the meaning of section 119. The Third Circuit stated that it rejected the interpretation of the *Tougher* case that the term "meals" should be contrued to apply only to prepared, ready-to-eat portions of food, but held that "the furnishing of groceries to the taxpayer • • • where such groceries were furnished for the convenience of the employer on the premises of the employer and where such groceries were prepared into meals and consumed by the taxpayer on the employer's premises constitutes meals furnished within the meaning of section 119."

In our view the meal allowance furnished to petitioner is not excludable under section 119 since it was a cash allowance and not meals furnished in kind. For this reason it is unnecessary for us to consider whether the facts here would otherwise bring the meal allowance furnished to petitioner within the scope of section 119.

Petitioner makes a final argument that the New Jersey State police are in effect part of the military and therefore should be entitled to exclude the cash allowance on the same basis as military personnel are entitled to such an exclusion. Petitioner quotes the provisions of section 1.61-2(b), Income Tax Regs.,[7] that amounts received by

[7] Sec. 1.61-2(b) *Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service.* Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross

members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service as commutation of quarters and as subsistence allowances and the value of quarters and subsistence furnished to them are excludable from their gross income. Petitioner argues that the same rationale which justifies the exclusion of such amounts by military personnel justifies the exclusion of the meal allowance by a state trooper. In our view the two situations are not comparable. In fact, Congress in the 1954 Code enacted as section 120 thereof a provision allowing an exclusion of any amount received as a statutory subsistence allowance by a taxpayer who was employed as a police official by any State, Territory, or possession of the United States to the extent such statutory subsistence allowance did not exceed $5 a day. The House and Senate reports with respect to the enactment of section 120 both referred to the section as "new."[8] In our view the fact that this provision was placed

income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income. For the exclusion from gross income of—

(1) Disability pensions, see section 104(a)(4) and the regulations thereunder;

(2) Mustering-out payments, see section 113 and the regulations thereunder;

(3) Miscellaneous items, see section 122. However, the per diem allowance in lieu of subsistence and the mileage allowance received by such persons while in a travel status or on temporary duty away from their permanent stations shall be included in their gross income.

[8] H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591) 83d Cong., 2d Sess. (1954) stated with respect to section 120:

Section 120. *Statutory subsistence allowance received by police*

This section is new and provides for an exclusion from gross income for any amount received as a statutory sub-

in the 1954 Code even though the provision was repealed in 1958, clearly indicates not only that a cash allowance was not contemplated under section 119 but also that it was not the view of Congress that policemen would come under the exclusion then long accepted for military personnel.

Petitioner's final contention is that he is entitled to deduct the entire amount he received as a meal allowance as travel expenses while away from home. Petitioner points

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sistence allowance by a taxpayer who is employed as a policeman by any State, Territory, or possession of the United States or any political subdivision thereof or by the District of Columbia.

The term "police official" in this section includes an employee of any of the foregoing governmental units who has police duties, such as a sheriff, a detective, or a State police trooper, however designated. For example, it encompasses the State police in Georgia who are designated the Georgia Bureau of Investigation.

The exclusion under this section is limited to a statutory subsistence allowance which does not exceed the rate of $5 per day. To the extent that any amounts received as a statutory subsistence allowance are excludable from gross income under this section, no deduction is allowable for expenses in respect of which the statutory allowance is paid; however, any expenses in excess thereof may be deducted if they are otherwise allowable as a deduction. For example, if a State statute provides a subsistence allowance of $5 per day, but the taxpayer, a State police trooper, incurs expenditures of $7.50 for meals while away from home overnight on official police duties, he would be entitled to a deduction of $2.50 under subparagraph (2) (B) of section 62 (relating to expenses for travel away from home). The remaining $5 would be disallowed as a deduction under this section since he is permitted to exclude $5 as a statutory subsistence allowance.

S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591, 83d Cong. 2d Sess. (1954), contained substantially the same statements with respect to sec. 120.

out that travel away from home was held in *United States v. Correll*, 389 U.S. 299 (1967), to exclude travel requiring "neither sleep nor rest" but that the record shows that petitioner was away from his duty station in Highstown Barracks and Newark for at least 36 days on assignment requiring sleep and rest. Petitioner points out that since he spent at least the amount of his meal allowance while on active duty and since he was on active duty at times away from both his residence and his duty station in Highstown Barracks and Newark, he should be entitled to the full amount of his meal allowance as a deduction.

Clearly, petitioner was away from home for a substantial portion of the time he was on active duty, whether his home be considered as his place of residence or as the Highstown duty station. We have found from the records petitioner kept that he spent 200 nights away from home on active duty. Certain of these nights were spent at the Highstown duty station. However, in a situation such as petitioner's where his duty station was changed at various times during the year, in our view under our holding in *Hollie T. Dean*, 54 T.C. 663, 667 (1970), that where a taxpayer does not have a "*nontemporary* principal place of business away from the vicinity of his residence, then his place of residence remains his home for tax purposes," we conclude that petitioner in this case was away from home within the meaning of section 162(a)(2) for the 200 days that we found him to be "away from home."

Respondent does not contend that petitioner, who received an advance to cover his meals of only about $5 a day, is required under section 274 to produce receipts for his meals to be entitled to a deduction under section 162

(a)(2) if he is able otherwise to establish the number of days he was away from home overnight.

Petitioner was given an advance for meals while on active duty. The 200 nights he spent away from home were most of the days he was on active duty, except for the period January to March 9, 1970, when he was assigned to a radar team on the New Jersey Turnpike and slept at his home in Linden, and for a period from May 7 through June 28, 1970, when he was screening applicants and worked from his home, the total of the two periods being approximately 4 months. Petitioner spent two-thirds of his active duty period away from home and is therefore entitled to deduct two-thirds of the $1,704 meal allowance to which he was entitled as a state trooper in New Jersey, making a total deduction for meals while away from home for the year of $1,136.

Reviewed by the Court.

Decision will be entered under Rule 155.

WILBUR, *J.*, concurring: While I concur with the majority, I add a few additional thoughts concerning the extraordinary contention that meals furnished by cash contributions of the employer are excludable from gross income *without regard to section 119*. This strikes me as demonstratively false for several reasons:

(1) Cash is more presumptively compensatory than in kind benefits. In permitting an exclusion for meals and lodging provided in kind, Congress required that the in kind benefits be provided; (a) on the business premises, (b) for the convenience of the employer, and (c) in the case of lodging, as a condition of employment. If these

benefits, when provided through cash payments to the employee can be excluded solely on the basis that they are noncompensatory, conditions (a) and (c) can be effectively eliminated from the statute. Since in determining whether the cash payment is compensatory the considerations invoked by the "convenience of the employer test" (regardless of what label we ascribe to the criterion) will be applied, the only condition of section 119 that would be applicable would be the convenience of the employer.

(2) This would mean that where lodging is provided very close to the business premises of the employer for the convenience of the employer the additional requirements of section 119 that the lodging be provided on the business premises as a condition of employment can be avoided by simply providing the equivalent of the rental payment to the employee in cash. The strict construction of the statute provided by *Charles N. Anderson*, 42 T.C. 410 (1964), revd. 371 F. 2d 59 (6th Cir. 1966) [1] can easily be circumvented.

(3) Even those courts that have liberally construed section 119 [2] to encompass cash payments nevertheless recognize that Congress in any event predicated the exclusion on *all* of the conditions contained in section 119 being met. We, of course, have held that the benefits of the exclusion provided by section 119 are not available in the case

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[1] See also *Jack Lindeman*, 60 T.C. 609 (1973). (See concurring opinion of J. Tannenwald at 617.)

[2] *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963), affg. 205 F. Supp. 307 (S.D. Miss. 1962); *United States v. Morelan*, 356 F. 2d 199 (8th Cir. 1966), affg. 237 F. Supp. 879 (D. Minn. 1965); *United States v. Keeton*, 383 F. 2d 429 (10th Cir. 1967), affg. 256 F. Supp. 576 (D. Colo. 1966).

of cash payments. (*Burl J. Ghastin*, 60 T.C. 264 (1973)). It would be anomalous in the extreme to adhere to this position and nevertheless conclude that an exclusion for cash payments is permissible without regard to section 119 if they are for the convenience of the employer (however differently a criterion invoking the same considerations may be phrased) and therefore noncompensatory.

(4) It would be an extraordinary interpretation of the statute to permit cash payments for meals and lodging to be excluded under conditions more favorable than that provided for in kind benefits under section 119. Additionally, the enactment and repeal of section 120, which dealt specifically with subsistence payments for meals and lodging would be completely ignored by such interpretation.[3]

QUEALY, *J.*, agrees with this concurring opinion.

DRENNEN, *J.*, concurring and dissenting: I agree with the majority that *Jack E. Golsen*, 54 T.C. 742, does not require us to follow the conclusion of the Third Circuit in *Saunders v. Commissioner*, 215 F. 2d 768, for the reasons stated in the majority opinion. I also agree with the majority that the meal allowance must be included in petitioner's income and is not excludible under section 119 of the Code. Section

[3] Sec. 120, I.R.C. 1954; H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2 Sess. 19, A39-40 (1954); S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591, 83d Cong., 2d Sess. 19, 191 (1954); Technical Amendments Act of 1958 Pub. L. 85-866, 72 Stat. 1607; H. Rept. No. 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 817; S. Rept. No. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 935-36; Conf. Rept. No. 2632, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1205.

119 is clearly concerned with "meals in kind," which these are not; the legislative history mandates such a conclusion. And, as stated in section 61(a) and recognized in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, and *Commissioner v. LoBue*, 351 U.S. 243, gross income means all income from whatever source derived. Here petitioner had complete, unfettered discretion as to how the allowance would be used. Under these circumstances I do not believe it makes any difference whether the amount paid to petitioner was intended as additional compensation or was made to in some way accommodate the employer. It is taxable income under section 61 unless specifically excluded under some other provision in the Code.

But I respectfully disagree with the majority in its conclusion that the cost of petitioner's meals are deductible only to the extent that they are eaten while away from home overnight, under section 162(a)(2). In my opinion petitioner's cost of meals eaten while on active duty under circumstances which made him subject to call at all times should be considered ordinary and necessary expenses of his business of being a State trooper, deductible under section 162(a) to the extent he can substantiate the expenditures for that purpose. In other words I would not consider these to be travel expenses, but rather to be ordinary and necesary expenditures required as a part of petitioner's duties, for the convenience of his employer.

"Over the years we have held on more than one occasion that a taxpayer may be in the trade or business of being an employee." *David J. Primuth*, 54 T.C. 374, 377 (1970). Thus, I conclude that petitioner's status as a New Jersey State trooper rose to the dignity of being a trade or busi-

ness. In addition, I do not perceive the problem presented here to be whether petitioner's meal expenses may be characterized as "ordinary and necessary" within the meaning of section 162(a). I assume that the expenses were "necessary" in the sense of being "appropriate and helpful," and that they were "ordinary" in the context of "life in all its fulness," *Welch v. Helvering*, 290 U.S. 111, 113, 114-5 (1933).

The inquiry here is whether sufficient nexus existed between these expenses and the "carrying on" of petitioner's trade or business to qualify them for deduction under section 162(a), or whether they were in essence personal or living expenses and nondeductible by virtue of section 262, cf. *Louis Drill*, 8 T.C. 902 (1947). I consider the expenses to have a dual character, partly business and partly personal, and their tax treatment depends upon which aspect outweighs the other. Cf. *George A. Papineau*, 16 T.C. 130, 131 (1951).

I think it is clear that the circumstances under which petitioner was required to take his meals were established for a substantial noncompensatory business reason of the employer in order to have petitioner and other State troopers available for emergency call during the meal period. It is equally clear from the record that emergencies were reasonably expected to occur, and actually did occur, which required petitioner to perform his job during his meal period. In addition the record indicates that a substantial motive of petitioner's employer in regulating its employees' meals was to reduce markedly the amount of time its employees used for eating, so that the employees would have more time to devote to their duties.

In sum, under the narrow circumstances before us, I find that petitioner has made a sufficient showing of business necessity for eating his meals on the job to take his expenses therefor out of the ambit of section 262 and to qualify them for a deduction under section 162(a). As said in *Arthur Benaglia*, 36 B.T.A. 838 (1937), the meals were not eaten on the job for petitioner's "personal convenience, comfort, or pleasure, but solely because he could not otherwise perform the services required of him." I find that the eating of his meals while on duty and at the site of his duty was a necessary and required part of this petitioner's business and the cost of those meals was an ordinary and necessary expense of his business. The fact that personal needs of petitioner were also satisfied was an incident of his business. Cf. *Gunnar Van Rosen*, 17 T.C. 834, 838 (1951).

I believe the allowance of deductions to employees of amounts they can prove were spent for meals taken, of necessity, on the job is more compatible with the structure of our taxing system than the exclusion from income of the entire allowance received for subsistence. This finds support in section 62(2)(A) of the 1954 Code which, in defining "adjusted gross income," permits an employee to deduct from gross income the deductions allowed by part VI (which includes section 162(a)) "which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer."

I recognize that my conclusion may be inconsistent with the conclusions of this Court on this point in *Charles H.*

Hyslope, 21 T.C. 131 (1953), and *Robert H. Saunders*, 21 T.C. 630, reversed by the Third Circuit *supra*. However, I think there have been enough changes in the approach to the deductibility of employee expenses since those cases were decided to justify taking another look at the application of our conclusions to the particular factual situation here involved.

STERRETT, *J.*, dissenting: It has long been recognized by Congress that all amounts paid by an employer to, or on behalf of, an employee are not includible in the gross income of the employee. Secs. 101, 105, 106, 107, 112, 113, 117 and 119. Such specific exclusions are not exhaustive. *Rudolph v. United States*, 370 U.S. 269, 274 (1962).

The courts have long agreed that everything of value received by an employee from his employer does not represent income. *Jones v. United States*, 60 Ct. Cl. 552 (1925) (quarters allowance for Army officer); *Bercaw v. Commissioner*, 165 F. 2d 521 (4th Cir. 1948) (quarters allowance for Army officer); *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954) (meal allowance for state police); *Diamond v. Sturr*, 221 F. 2d 264 (2nd Cir. 1955) (food and lodging to employee while on duty at mental institution); *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963) (meal allowance for state trooper); *United States v. Gotcher*, 401 F. 2d 118 (5th Cir. 1968) (expense paid trip to Germany); *Arthur Benaglia*, 36 B.T.A. 838 (1937) (meal and lodging for hotel manager); *John E. Cavanagh*, 36 T.C. 300 (1961) (reimbursement for food and lodging incurred because of move).

It is worth noting that all of the above cases reach the identical conclusion, that the item of value did not represent income to the recipient, based upon an analysis of section 61, or its predecessor section 22(a) of the 1939 Code, and *not* upon any specific exclusionary provision. It is also worth noting that, while some of the cases cited above involve payment in kind and some payment in cash, the form of payment is not controlling. Any distinction based upon this distinction was rejected by the *Saunders* case:

> • • • Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation. [215 F. 2d at 771]

The respondent himself, as early as his Regulations 45 which were in effect in 1920, ruled in Article 33 thereof that living quarters furnished an employee for the convenience of the employer did not represent income. During this period the revenue service had held that in varying situations amounts furnished to employees in cash or in kind need not be included in their respective gross incomes.[1]

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[1] See O.D. 11, 1 C.B. 66 (1919). An American Red Cross volunteer receiving maintenance should report as income only the excess, if any of the maintenance allowance over actual living expenses; O.D. 265, 1 C.B. 71 (1919). "Board and lodging furnished seamen in addition to their cash compensation is • • • supplied for the convenience of the employer and [its] value • • • is not required to be reported in such employees' income tax returns."; O.D. 514, 2 C.B. 90 (1920). "Supper money" paid to an employee who performs extra labor after regular business hours for the convenience of the employer does not represent additional taxable income.

In 1940 the regulations promulgated earlier were amended in relevant part to read as follows:

> If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such a person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. [T.C. 4965, 1940-1 C.B. 13, 14]

This regulation was interpreted by the respondent in later publications in which he explained that the "convenience of the employer" rule should not be applied in those situations in which it is evident from the other circumstances that the receipt of the quarters and meals represented additional compensation, and that the rule would be met if they were required to be accepted by an employee so that he could properly perform his duties. Mim. 5023, 1940-1 C.B. 14, Mim. 6472, 1950-1 C.B. 15.

The common theme, the rationale for all the foregoing exclusions is that amounts paid to an employee for the convenience of the employer and not intended to be compensatory are not includible in income. For this cause of action to come within this framework we believe the determination that must be made is whether the meal allowance was furnished to the petitioner for his services or whether it was furnished to him so that he would eat in the manner prescribed. See *Jones, supra,* at 570. If after a review of the evidence in the record, the latter determination prevails the amounts furnished should not be included in gross income.

The court in *Saunders* was faced with facts, as the majority has noted, "not substantially different from those involved in the instant case". Using language from respondent's own explanation of the regulations is said:[2]

> Since it is not "evident" to us that the rations allowance was furnished as compensation, we should next determine, as indicated by Mimeo 5023, whether *Saunders* was "required to accept such * * * meals in order to perform properly his duties" and thus whether the rations allowance was furnished for the convenience of the employer so as not to be taxable. * * * [215 F. 2d at p. 774]

The court then went on to find that the meal allowance was so furnished and excluded it from gross income.

It is a historical fact that New Jersey provided its troopers with meals before switching to the meal allowance program. This decision was based on the hard realities of economics and efficiency. The majority opinion has made a finding of fact that "The meal allowance was not intended to represent additional compensation",[3] leaving as the sole determining factor whether the meal allowance was paid to the petitioner for the convenience of the employer.

Police are engaged in a unique occupation, one that deals with public safety—a line of work that by its very nature

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[2] See also the Fifth Circuit's statement in *Barrett, supra.* 321 F. 2d at 913:

> We find ourselves in accord with *Saunders*: the "convenience of the employer" test is the key criterion in determining whether or not payments are income. * * *

[3] In this connection compare *Stephen L. Zolnay*, 49 T.C. 389. 396 (1968), where in the context of the exclusion for scholarship authorized by sec. 117 the issue was stated "Was the taxpayer paid to work or paid to study?"

breeds emergencies at any time of day or night. The interests of the employer, the state, in furtherance of its responsibility for the public safety, demand that it require its troopers to eat when, where and for a duration that does not jeopardize the employer's responsibility to the public. The state adopted the meal allowance system to assist it in carrying out this responsibility. Surely this decision is within the employer's prerogative. See also *United States v. Keeton,* 256 F. Supp. 576, 580 (1966), affirmed per curiam 383 F. 2d 429 (10th Cir. 1967), Income Tax Regs. section 1.119-1(a)(2)(ii)(C).

It is difficult to conceive of a situation where an employee must so clearly take his meals at the convenience of the employer. This conclusion with respect to the convenience of the employer is supported by the discussions in *Barrett v. United States, supra; United States v. Morelan,* 356 F. 2d 199 (8th Cir. 1966); *United States v. Keeton, supra;* and *Tony M. Smith,* — F. Supp. — (D. Ct. Miss 1974), on appeal 5th Cir., each in the context of meal allowances for state troopers. See also Regs. section 1.119-1 (a)(2).

Turning now to a few brief comments on the majority opinion, the citation by the Third Circuit of its *Saunders* decision in *Jacob v. United States,* 493 F. 2d 1294, 1297 (3rd Cir. 1974) with specific reference to the convenience of the employer doctrine seems to us to be a clear reaffirmation of that doctrine long after the enactment of section 119. The Third Circuit clearly implied that the test survived the enactment of the 1954 Code. I also do not understand how the majority can construe the language [4] in the Committee reports dealing with the prospective section 119 as meaning "that the only exclusion for meals and lodging intended by Congress to be available to any taxpayer other than members of the Armed Forces after the enactment of the 1954 Code were meals and lodging excludable under the provisions of section 119." After all there always have been more employers in the United States whose convenience must be served than the military services.

In conclusion, petitioner has received a cash allowance in lieu of meals previously provided by the state. Petitioner has shown that it was not compensatory, was required to be received primarily for the benefit of his employer so that he could properly perform his duties, and additionally that it was spent for the purpose paid. As such we believe the determination must be made in petitioner's favor. I would not include the cash meal allowance in petitioner's gross income.

FORRESTER, TANNENWALD, GOFFE, HALL, and WILES, *JJ.*, agree with this dissent.

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[4] "* * * Therefore, any cash allowance for meals or lodging received by an employee will continue to be includible in gross income, as under existing law, to the extent that such allowance constitute compensation. [H. Rept. No. 1337, 83d Cong. 2d Sess. (1954), to accompany H.R. 8300]

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-1312

ROBERT J. KOWALSKI and NANCY A. KOWALSKI,
Appellants.

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES TAX COURT
(Tax Court Docket No. 112-73)

Argued October 22, 1976
Before: ALDISERT and GIBBONS, *Circuit Judges*, and McGLYNN, *District Judge* *

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OPINION OF THE COURT

(Filed November 11, 1976)

PER CURIAM.

The central question for decision is whether amounts advanced to the taxpayer, a New Jersey State trooper, as a meal allowance may be excluded from his gross income. The United States Tax Court, in a split in banc decision, ruled in favor of the Commisioner. The taxpayer has appealed. We reverse.

The precise issue, albeit presented prior to 1954 when section 119 [1] was added to the Code, was decided by us in *Saunders v. Commissioner*, 215 F.2d 768 (3rd Cir. 1954), in which we ruled in favor of the New Jersey State troopers and reversed 21 T.C. 630 (1954). Although not presenting

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* Joseph L. McGlynn, Jr., of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

1. 26 U.S.C. §119. *Meals or lodging furnished for the convenience of the employer*

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

the precise issue, *Jacob v. United States,* 493 F.2d 1294 (3d Cir. 1974), gave continued vitality to the *Saunders* rationale. Speaking through Judge Van Dusen, in *Jacob* we said:

> Our position finds support in the so-called "state trooper" cases, in which courts have held that state troopers are entitled to exclude under § 119 the amount of cash allowances for meals taken at roadside restaurants. See United States v. Keeton, 383 F.2d 429 (10th Cir. 1967); United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); United States v. Barrett, 321 F.2d 911 (5th Cir. 1963); Saunders v. Commissioner of Internal Revenue, 215 F.2d 768 (3d Cir. 1954);[6] but see Wilson v. United States, 412 F.2d 694 (1st Cir. 1969). While these cases are not exactly on point,[7] they nevertheless show that courts have focused primarily on the "convenience of the employer" test in determining whether an employee is entitled to an exclusion under § 119 and have construed the term "meals" broadly in order to give effect to the basic purpose and spirit of § 119.[8]

493 F.2d at 1297.

[6] *Saunders, supra,* involved facts arising prior to 1954 when § 119 was added to the Internal Revenue Code, but the reasoning of *Saunders* was followed in the above-cited post-1954 cases.

[7] In the "state trooper" cases, the courts have focused principally on the meaning of the provision in Treasury Regulation § 1.119-1(c)(2) that "the exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee." Despite this "in-kind" language, the courts have held that cash allowances for meals are excludable from the state troopers' income. The Commissioner argues that this "in-kind" language nevertheless precludes a conclusion in the instant case that groceries can constitute meals. We disagree. If the furnishing of cash allowances is properly excludable under § 119, then the furnishing of groceries, under the facts of this case, should be excludable also.

[8] In *Saunders, supra,* this court stated, in considering the principles which had evolved prior to the enactment of § 119, that "the rationale of the rule should make it applicable to determine the extent of gross income either when . . . meals are furnished in kind or cash is paid in lieu thereof." 215 F.2d at 771. The court also stated that the convenience of the employer was the key criterion in determining whether the cash allowances were excludable *Id.* at 772.

We have not been persuaded to depart from the position taken by this court from 1954 to 1974. We adhere to our reasoning in *Saunders* and *Jacob* and align ourselves with the Fifth, Eighth, and Tenth Circuits.

Accordingly, and for the reasons set forth in the dissenting opinion of Judge Sterrett in *Kowalski v. Commissioner,* 65 T.C. 44 (1975),[2] we will reverse the decision of the United States Tax Court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U.S. Courts, International Printing Co., Phila., Pa.)

[2] Five other judges of the United States Tax Court agreed with Judge Sterrett's dissenting opinion.

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-1312

ROBERT J. KOWALSKI and NANCY A. KOWALSKI,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

(Tax Court Docket No. 112-73)

ON APPEAL FROM A DECISION OF THE UNITED STATES TAX COURT

Present: ALDISERT and GIBBONS, *Circuit Judges* and McGLYNN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby reversed. Costs taxed against the appellee.

Attest:

s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

November 11, 1976

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* Joseph L. McGlynn, Jr., of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him

by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.119-1 Meals and lodging furnished for the convenience of the employer.

•

(a) *Meals*—(1) *In general.* The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) *Meals furnished without a charge.* (i) Meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of

the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. • • •

(ii) (*a*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

• • • • •

(*c*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (*c*) when there are insufficient eating facilities in the vicinity of the employer's premises.

• • • • •

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

• • • • •

(c) *Rules.* (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

(d) *Examples.* The provisions of section 119 may be illustrated by the following examples:

• • • • •

Example (5). A Civil Service employee of a State is employed at an institution and is required by his employer to be available for duty at all times. The employer furnishes the employee with meals and lodging at the institution without charge. Under the applicable State statute, his meals and lodging are regarded as part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from his gross income.

• • • • •

Example (8). A manufacturing company provides a cafeteria on its premises at which its employees can purchase their lunch. There is no other eating facility located near the company's premises, but the employee can furnish his own meal by bringing his lunch. The amount of compensation which any employee is required to include in gross income is not reduced by the amount charged for the meals, and the meals are not considered to be furnished for the convenience of the employer.

Example (9). A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals.

MAR 25 PAGE 3

Supreme Court, U. S.
FILED
MAR 14 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-1095 and 76-1243

In the Supreme Court of the United States

October Term, 1976

Commissioner of Internal Revenue, petitioner

v.

Robert J. Kowalski and Nancy A. Kowalski

United States of America, petitioner

v.

Tony M. Smith and Nellie Smith

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

Daniel M. Friedman,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1095

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

NO. 76-1243

UNITED STATES OF AMERICA, PETITIONER

v.

TONY M. SMITH AND NELLIE SMITH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

In our petition for a writ of certiorari in *Commissioner* v. *Kowalski*, 544 F. 2d 686 (C.A. 3), petition for a writ of certiorari pending, No. 76-1095, we pointed out (p. 7, n. 8) that the question whether cash meal allowance payments to state police troopers are excludable from gross income under Section 119 of the Internal Revenue Code of 1954 (26 U.S.C.) was awaiting decision in the Fourth Circuit in *Koerner* v. *United States*, 404 F. Supp. 1128 (S.D. W. Va.), on appeal to C.A. 4, No. 76-1495. See

also *United States* v. *Smith*, petition for a writ of certiorari pending, No. 76-1243, in which the same question is presented.

On February 28, 1977, the Fourth Circuit in *Koerner* upheld the government's position that such payments are not excludable from gross income. In so holding, the court followed *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1), and acknowledged that its decision was in conflict with the Third Circuit in *Kowalski*, and *United States* v. *Barrett*, 321 F. 2d 911 (C.A. 5), *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8), and *United States* v. *Keeton*, 383 F. 2d 429 (C.A. 10). For the convenience of the Court, we have set forth the *Koerner* opinion in the Appendix to this memorandum.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

DOJ-1977-03

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1495

Morgan P. Koerner and Juanita B. Koerner, who individually and as Class Representatives of all members of the West Virginia Department of Public Safety, and their spouses,

Appellees,

-versus-

United States of America,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington.

Dennis R. Knapp, District Judge.

Argued: December 9, 1976. Decided: February 28, 1977.

Before CRAVEN, RUSSELL and WIDENER, Circuit Judges.

PER CURIAM:

Plaintiffs are members of the West Virginia Department of Public Safety, commonly known as State police. Under West Virginia law, they are provided a subsistence allowance for each working day, in lieu of

housing, quarters and rations.[1] On the joint returns filed for the years 1967, 1968 and 1969, plaintiffs included these payments in their gross income, but subsequently filed amended returns for the years in issue, claiming an overpayment in taxes for each year based upon their erroneous treatment of the subsistence payments as income. The Commissioner of Internal Revenue denied the claims for refund on the ground that such payments were income and not excludable.[2] Thereafter, plaintiffs filed this refund action.[3] The District Court entered judgment in favor of the plaintiffs and the United States appealed. We reverse.

It is settled that deductions from income for federal tax purposes exist only as specifically authorized by statute;[4] and statutes authorizing such deductions are to be strictly construed.[5] The right to exclude from gross

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[1]After suit was filed, plaintiffs were allowed, without notice to the United States, through amendment of their complaint, to proceed both individually and as representatives of a class consisting of all the members of the State police in West Virginia. The United States claims error in allowing the action to proceed as a class action. We are inclined to agree with such contention, *see, Lipsett* v. *United States* (S.D. N.Y. 1965) 37 F.R.D. 549, 552, *aff'd.* 359 F. 2d 956, but, since we find that the claims of the plaintiffs are without merit, it is unnecessary to resolve this claim of error.

[2]Plaintiffs were denied a refund only for 1967 and 1969; the Commissioner inadvertently refunded the amount claimed for 1968.

[3]28 U.S.C. §1346(a)(1).

[4]*Commissioner* v. *Jacobson* (1949) 336 U.S. 28, 49; *Helvering* v. *Northwest Steel Mills* (1940) 311 U.S. 46, 49.

[5]*Bingler* v. *Johnson* (1969) 394 U.S. 741, 751-2; *Trustees of Graceland Cem. Imp. F.* v. *United States* (Ct. Claims 1975) 515 F. 2d 763, 770.

income "the value of any meals or lodging furnished to [an employee] by his employer for the convenience of the employer" is specifically limited by the Internal Revenue Code to meals "furnished on the business premises of the employer."[6] The phrase "furnished on the business premises of the employer" is neither vague nor indefinite; it is, as the Court said in *Wilson* v. *United States* (1st Cir. 1969) 412 F. 2d 694 at 696, a phrase "of great specificity." The plaintiffs while engaged in their duties concededly are not furnished meals "on the business premises of the employer." The payments made to them by the State of West Virginia cannot consequently meet the clearly stated requirements for exclusion from gross income under the Internal Revenue Code. The District Court should, therefore, have entered judgment for the United States.

We realize that in directing judgment for the United States, we are going against decisions in the Third,[7] Fifth,[8] Eight[9] and Tenth Circuits,[10] but, like the First Circuit,[11] we cannot read the plainly stated language of §119 as authorizing the exclusion of these payments to the plaintiffs for "meals" from gross income. It may seem unfair to make the distinction between meals "furnished

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[6]§119, 26 U.S.C.

[7]*Kowalski* v. *Commissioner* (3d Cir. 1976) ____ F. 2d ____; *Jacob* v. *United States* (3d Cir. 1974) 493 F. 2d 1294; *Saunders* v. *Commissioner of Internal Revenue* (3d Cir. 1954) 215 F. 2d 768.

[8]*United States* v. *Barrett* (5th Cir. 1963) 321 F. 2d 911.

[9]*United States* v. *Morelan* (8th Cir. 1966) 356 F. 2d 199.

[10]*United States* v. *Keeton* (10 Cir. 1967) 383 F. 2d 429.

[11]*Wilson* v. *United States, supra,* 412 F. 2d at 696.

* * * on the business premises of the employer" and those provided elsewhere, but deductions from income depend entirely on legislative grace and not on principles of absolute fairness.[12] Actually, it is unlikely that a completely fair system of taxation could be formulated.

The judgment of the District Court is reversed and the cause is remanded for the entry of judgment in favor of the United States.

REVERSED.

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[12] *Commissioner* v. *Sullivan* (1958) 356 U.S. 27, 28; *Harper* v. *United States* (D.S.C. 1967) 274 F. Supp. 809, 813, *aff'd.* 396 F. 2d 223; *Harper Oil Company* v. *United States* (10th Cir. 1970) 425 F. 2d 1335, 1342.

Supreme Court, U. S.
FILED
MAY 12 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

—*v.*—

ROBERT J. KOWALSKI & NANCY A. KOWALSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 7, 1977
CERTIORARI GRANTED MARCH 28, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

—*v.*—

ROBERT J. KOWALSKI & NANCY A. KOWALSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES TAX COURT

GENERAL DOCKET

Docket No. 112 73

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
PETITIONER
33 Armstrong Drive
Clark, New Jersey 06066

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES FOR PETITIONER: W/D 2/8/74

Carl B. Cordes, Herrick K. Lidstone, 280 Park Ave., NY, NY 10017 (E/A 1/21/74)
(Cordes Firm is: Battle, Fowler, Lidstone, Pierce and Kheel)

Richard Kilcullen (E/A 2/27/74) 280 Park Avenue, New York, New York 10017

Date	Filings and Proceedings
Jan. 2, 1973	PETITION FILED: FEE PAID Jan. 2, 1973. Served Jan. 5, 1973.
Mar. 6, 1973	REQUEST by Resp. for trial at Newark, New Jersey. GRANTED Mar. 12, 1973. Served Mar. 12, 1973.
Mar. 5, 1973	ANSWER filed by Resp. Served Mar. 12, 1973.
Nov. 23, 1973	NOTICE OF TRIAL on Feb. 25, 1974 at Newark, N.J. Served Nov. 23, 1973.
Jan. 21, 1974	Entry of Appearance by Carl B. Cordes for Petr. filed. Served Jan. 25, 1974.
Jan. 21, 1974	Entry of Appearance by Herrick K. Lidstone for Petr. filed. Served Jan. 25, 1974.

Date	Filings and Proceedings

Jan. 31, 1974 MOTION by Resp. for leave to file Amendment to Answer. (Amendment to Answer Lodged). GRANTED Feb. 20, 1974. Served Feb. 21, 1974.

Feb. 4, 1974 NOTICE of filing of resp. motion for leave to file amendment to answer. Petrs are directed to file on or before Feb. 18, 1974 either a notice of objection or notice of no objection. Served Feb. 4, 1974.

Feb. 6, 1974 MOTION by Earl G. Thompson for leave to withdraw as Counsel for Petitioner. GRANTED Feb. 8, 1974. Served Feb. 12, 1974.

Feb. 14, 1974 RESPONSE TO MOTION FOR LEAVE TO FILE AMENDMENT TO ANSWER filed by Petr. Served Feb. 21, 1974.

Feb. 20, 1974 AMENDMENT TO ANSWER FILED. Served Feb. 21, 1974.

Feb. 27, 1974 TRIAL at Newark, N.J. before Judge Sterrett. ENTRY OF APPEARANCE of Richard Kilcullen filed. Stipulation of facts with exhibits filed. Brief dates to be set when record is closed. See Order 10/14/75 (record remains open to receive additional evidence.)

Mar. 28, 1974 TRANSCRIPT of Feb. 27, 1974 rec'd.

April 8, 1974 REPLY by Petr. filed. Served Apr. 8, 1974.

May 22, 1974 ORDER, that the parties are granted an extension of time to July 1, 1974 to submit a Suppl. Stipulation and to report the necessity for additional trial time. May 23, 1974.

July 30, 1974 SUPPLEMENTARY STIPULATION OF FACTS FILED.

July 31, 1974 ORDER, that record in this case be closed and further that Parties file Briefs on or before October 30, 1974 and Reply Briefs on or before December 29, 1974. Served Aug. 1, 1974.

Date	Filings and Proceedings

Oct. 21, 1974 MOTION by Resp. to extend time to Nov. 22, 1974 and Jan. 24, 1975, within which to file Briefs and Reply Briefs, respectively. (No Obj. Petr.). GRANTED Oct. 22, 1974. Served Oct. 23, 1974.

Nov. 22, 1974 BRIEF FOR RESPONDENT filed. Served Nov. 26, 1974.

Nov. 25, 1974 BRIEF FOR Petr. filed. (P. M. timely). Served Nov. 26, 1974.

Jan. 24, 1975 REPLY BRIEF for Resp. filed. Served Jan. 28, 1975.

Jan. 27, 1975 REPLY BRIEF for Petr. filed. (P.M. timely). Served Jan. 28, 1975.

Oct. 14, 1975 ORDERED, that this case is reassigned to Judge Scott. Served Oct. 14, 1975.

Oct. 14, 1975 FINDINGS OF FACT & OPINION filed, Judge Scott. (Decision will be entered under Rule 155.) Served Oct. 14, 1975.

Jan. 2, 1976 AGREED COMPUTATION. Filed.

Jan. 6, 1976 DECISION ENTERED, Judge Scott. Served Jan. 6, 1976.

APPELLATE PROCEEDINGS

Feb. 2, 1976 NOTICE OF APPEAL, to U.S.C.A., Third Circuit, filed by Petrs. Served Feb. 2, 1976.

Feb. 2, 1976 NOTICE of Filing with copy of notice of appeal sent to Mr. Meade Whitaker, Chief Counsel. Served Feb. 2, 1976.

Feb. 2, 1976 NOTICE, to parties, of assembling and date for transmission of the record. Served Feb. 2, 1976.

THE UNITED STATES TAX COURT

Docket No.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
PETITIONERS

—*v*—

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Symbols AU:SB:90), dated October 5, 1972, and as a basis for their case allege as follows:

1. The petitioners, Robert J. Kowalski and Nancy A Kowalski, reside at 33 Armstrong Drive, Clark, New Jersey 06066. The return for the period here involved was filed with the District Director, Internal Revenue Service, Newark, New Jersey.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioners on or about October 5, 1972.

3. The taxable year involved is 1970 for which year the Commissioner determined a deficiency in income tax of $69.54, all of which is in dispute.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

> Respondent erroneously included as gross income of Robert J. Kowalski, ("petitioner"), or, in the alternative, if such inclusion in gross income was proper, erroneously disallowed for the year 1970 either (a) an exclusion from gross income of $405.00 constituting a portion of the cost and value of meals furnished by and for the convenience of petitioner's employer, the New Jersey State Police or (b) a deduction of $405.00 of expenses constituting a portion

> of the ordinary and necessary business expenses of petitioner in connection with his employment while away from home.

5. The facts upon which petitioner relies as a basis for his case are as follows:

(a) Petitioner during the year in controversy was a trooper of the New Jersey State Police ("trooper"), a part of the Department of Law and Public Safety of the State of New Jersey.

(b) As a trooper, petitioner is subject to quasi-military discipline. He may not withdraw from the force at will. Regardless of the nearness of his home to his station, he is allowed to be home only at specifically authorized times. He is on call twenty-four hours a day, seven days a week.

(c) On information and belief the New Jersey State Police formerly supplied troopers with meals at their stations at no cost. To avoid total absence of patrol personnel during meal periods, food maintenance payments were later paid to allow troopers to remain where required by their duties outside their stations. To be on call during meals, petitioner must choose restaurants meeting specifications of the New Jersey State Police and provide the employer with the restaurant's telephone number in advance. Petitioner in the year in controversy received a maintenance allowance which included food maintenance.

(d) Petitioner at all times met his employer's requirements concerning the kind and location of restaurant used.

(e) Petitioner was required to travel and live away from his family home during his extended duty periods while not on leave and he was required to leave his regular assigned station on numerous occasions for riot control duty, for training and to investigate accidents. Petitioner was away from his regular assigned station seventy-five days during calendar year 1970.

(f) While travelling away from home, petitioner as a trooper on duty, incurred food expenses which were ordi-

nary and necessary expenses connected with his employment-related travel. The value and cost of such food was $405.00, during the last three months of 1970.

WHEREFORE, petitioner prays that this Court may hear the case and redetermine the deficiency due with respect to 1970 and that the petitioner may have such other and further relief as to the Court may seem just.

/s/ Earl G. Thompson
EARL G. THOMPSON
Counsel for Petitioner
Battle, Fowler, Stokes & Kheel
280 Park Avenue
New York, New York 10017

[Verification Omitted]

P.O. Box 2 Newark, N.J. 07101
DEPARTMENT OF THE TREASURY

DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

Date: Oct. 5, 1972

In reply refer to: Au:SB:90

[SEAL]

— Mr. Robert J. Kowalski and
Mrs. Nancy A. Kowalski
33 Armstrong Drive
Clark, New Jersey 07066

CERTIFIED MAIL

— Dear Mr. and Mrs. Kowalski:

T .x Year Ended	Deficiency
December 31, 1970	$69.54

This letter is to notify you—as required by law—that we have determined the income tax deficiencies shown above. I regret we have been unable to reach a satisfactory agreement in your case. The enclosed statement shows how the deficiencies were computed.

If you do not intend to contest this determination in the United States Tax Court, please sign and return the enclosed Short-Form Statutory Notice Statement. This will permit an early assessment of the deficiencies and limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience.

If you decide not to sign and return the statement, the law requires that after 90 days from the date of mailing this letter (150 days if this letter is addressed to you outside the United States and the District of Columbia) we assess and bill you for the deficiencies. However, if within the time stated you contest this determination by filing a petition with the United States Tax Court, Box 70, Washington, D.C. 20044, we may not assess any deficiencies and bill you until after the Tax Court has

decided your case. The time in which you may file a petition with the Court (90 or 150 days, as the case may be) is fixed by law, and the Court cannot consider your case if your petition is filed late.

Under section 7463 of the Internal Revenue Code, the United States Tax Court has a simplified procedure for handling cases where the disputed portion of the deficiency does not exceed $1,000 for any one taxable year. You may obtain information on this special procedure, as well as a copy of the rules for filing a petition with the Tax Court, by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

Sincerely yours,
Johnnie M. Walters
Commissioner

By /s/ Raymond A. Spillman
Acting District Director

Enclosures:

Statement
Envelope

FORM 2947 (REV. MAY 1970)	DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE SHORT-FORM STATUTORY NOTICE STATEMENT	DATE OF STATUTORY NOTICE OCT 5 - 1972

NAMES AND ADDRESS OF TAXPAYERS

Mr. Robert J. Kowalski and
Mrs. Nancy A. Kowalski
33 Armstrong Drive
Clark, New Jersey 07066

KIND OF TAX

INCOME

TAX YEAR ENDED	DEFICIENCIES	ADDITIONS TO THE TAX		
1970	$69.54			

The above deficiencies are based on adjustments and explanations as shown in the attached report of examination.

CONSENT TO ASSESSMENT AND COLLECTION

I do not wish to contest the above determination in the United States Tax Court; therefore I consent to the immediate assessment and collection of the deficiencies and additions to the tax, if any, indicated above, together with interest due.

	SIGNATURE OF TAXPAYER	DATE
NOTE: If a joint return was filed, both taxpayers must sign.	SIGNATURE OF TAXPAYER	DATE

IF YOU AGREE, PLEASE SIGN ONE COPY AND RETURN IT; KEEP THE OTHER COPY FOR YOUR RECORDS

6

U. S. GOVERNMENT PRINTING OFFICE : 1970 O - 406-243

FORM 2947 (REV. 5-7

Report of Individual Income Tax Audit Changes

Internal Revenue Service

Name of Taxpayer	Year	Form	Filing Status	In Reply Refer To
KOWALSK[illegible] & [illegible] A.	A7[illegible]	1040	[illegible]	[illegible]

Name And Title of Person With Whom Audit Changes Were Discussed	Date of Report	Social Security No	Examining District
	06097[illegible]	149 2[illegible]	[illegible]

INCOME AND DEDUCTION AMOUNTS ADJUSTED

Explanation No (See Attached)	Items Changed	Amount Shown on Return or As Previously Adjusted	Corrected Amount of Income And Deduction	Adjustments Increase or (Decrease)
	Food supplement inc.	405.	-0-	405.

A. Adjustment in Income Increase or (Decrease) (See Explanation of Adjustments Attached)	405.
B. Total Income or Taxable Income Reported or as Previously Adjusted	2657.
C. Corrected Total Income or Taxable Income	3062.
D. Tax Computed With Exemptions	460.54
E. Tax Surcharge	9.00
F. Tax Credits (Retirement Income, Investment, Foreign, or Other Allowable Credits) (If Adjusted, See Explanation Attached)	-
G. Self Employment Tax, Tax From Recomputing Prior Year Investment Credit (If Adjusted, See Explanation Attached)	-
H. Corrected Tax (Line D Plus Line E Plus Line G Less Line F)	469.54
I. Tax Shown on Return or as Previously Adjusted	400.00
J. Statutory Deficiency (Additional Tax Before Credits, Line H Less Line I)	69.54
K. Overassessment (Overassessment Before Credits, Line I Less Line H)	
L. Net Prepayment Credits (Excess F.I.C.A., Non-highway Gasoline Tax Credit, Regulated Investment Company Undistributed Capital Gain Credit, Previous Assessments, Refunds, And Credits (If Adjusted, See Schedule Attached))	400.00
M. Additional Tax (Line H Less Line L)	69.54
N. Overpayment (Line L Less Line H)	
O. Penalties (If Any, See Explanation Attached)	

Although this report is subject to review, you may consider it as your written notice that you have no objection to the adjustments shown and you waive the restrictions on assessment and collection of the deficiency and acquiescence in the disallowance of the overassessment, if any, shown above. If you agree, please sign one copy and return it in the enclosed return envelope. Keep the other copy with your records.

If you do not agree and wish to have further consideration given to your case, you should request a conference with the Appeals Office by filling out, signing, and returning the enclosed Form 5701. If you request a conference, it is important that you file your request within 30 days from the date of this letter to expedite the assessment and collection of the correct tax and to limit the accrual of interest. If you do not wish to request a conference, please sign and return the enclosed Form 870 as soon as possible. This will expedite the assessment and collection of the additional tax shown on Line M, plus any interest due on this tax and also any penalties shown on Line O, or the refund of any overpayment shown on Line N, less any interest and penalties shown on Line O.

FORM 3547
(FEBRUARY 1963)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

EXPLANATION OF ADJUSTMENTS

The amount claimed for food maintence is not an allowable deduction. The funds are taxable under I.R.C 61.

Please cite your reference & support your claim for a deduction of food maintenance

UNITED STATES TAX COURT

Docket No. 112-73

[Filed 1973 Mar 5 PM 3 29, United States Tax Court]

[Served Mar. 12, 1973]

ROBERT J. KOWALSKI AND
NANCY A. KOWALSKI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. Denies the allegations of paragraph 4 of the petition.

5. (a) Admits the allegations of paragraph 5(a) of the petition.

(b) through (f). Denies the allegations of paragraph 5(b) through (f) of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the deficiency determined by the respondent be in all respects approved.

/s/ Lee H. Henkel, Jr. GB
LEE H. HENKEL, JR.
Chief Counsel
Internal Revenue Service

OF COUNSEL:

EMORY L. LANGDON,
Regional Counsel
Internal Revenue Service
Room 904-970 Broad Street
Newark, New Jersey 07102

UNITED STATES TAX COURT

Docket No. 112-73

[Filed Feb. 20, 1974, United States Tax Court]

[Logged Jan. 31, 1974, United States Tax Court]

[Served Feb. 21, 1974]

ROBERT J. KOWALSKI AND
NANCY A. KOWALSKI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

AMENDMENT TO ANSWER

THE RESPONDENT, for amendment to the answer filed in the above-entitled case, strikes from said answer paragraph 3, and the prayer thereof and adds after paragraph 6 and prior to the prayer the following admissions, denials, and allegations:

7. (a) IN FURTHER ANSWERING the petition and in support of the respondent's claim for an increased deficiency in income tax for the taxable year 1970, the respondent denies the allegations of paragraph 3 of the petition; except it is admitted that the taxable year in dispute is $330.70 which represents the $69.54 as stated in the statutory notice plus the increased deficiency of $261.16 as herein requested.

(b) In the statutory notice of deficiency dated October 5, 1972 upon which the above-entitled case is based, the respondent determined that the deduction claimed for food maintenance is not an allowable deduction.

(c) Subsequent to the issuance of the statutory notice of deficiency it was determined that during 1970 petitioner Robert J. Kowalski received from the State of

New Jersey $1,697.52 allegedly for "commutations of rations".

(d) Of the $1,697.52 received by petitioner in 1970 only $326.00 was reflected in petitioner's W-2.

(e) In his 1970 Federal Income Tax Return petitioner reported as income only $326.00 of the $1,697.52 received in 1970, thus failing to include as income $1,371.52.

(f) In the statutory notice of deficiency dated October 5, 1972, upon which the above-entitled case is based the respondent erroneously failed to include as income the $1,371.52 described in subparagraph (e) above.

(g) As a result of the failure to include the $1,371.52 as income the respondent failed to compute the statutory medical adjustment which would be required if the $1,-371.52 was included in petitioner's income.

(h) The petitioner's taxable income for the taxable year 1970 as shown in said statutory notice, is thereby understated in the amount of $1,425.91, consisting of $1,371.07 of "reimbursed expense for meals" plus the statutory medical adjustment of $54.84.

(i) The correct deficiency in income tax due from the petitioner for the taxable year 1970 is in the amount $330.70, and not in the amount of $69.54 as determined in the statutory notice.

WHEREFORE, the respondent prays that the Court redetermine the deficiency in income tax for the taxable year 1970 to be the amount determined by the respondent namely, $69.54 plus an increased deficiency in the income tax for the taxable year 1970 in the amount of $261.16, claim for which is hereby made pursuant to the provisions of Int. Rev. Code of 1954 § 6214(a).

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

By: /s/ Gerald Backer
GERALD BACKER
Staff Assistant to the
Regional Counsel

OF COUNSEL:

Robert L. Liken,
Regional Counsel,
IRWIN R. COHEN,
Attorney,
Internal Revenue Service.

Room 904, 970 Broad Street,
Newark, New Jersey
201-645-3083

UNITED STATES TAX COURT

Docket No. 112-73

ROBERT J. AND NANCY A. KOWALSKI, PETITIONERS

—*v*—

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

REPLY

The above-named petitioners, in reply to the allegations contained in the Amended Answer in the above-entitled case, admit, deny and allege as follows:

7. (a) Admit that the amount of deficiency in dispute is $330.70 which represents the $69.54 as stated in the statutory notice plus the $261.16 alleged in the Amended Answer; deny the remaining allegations of sub-paragraph 7 of the Amended Answer.

(b) Admit the allegations of sub-paragraph (b) of paragraph 7 of the Amended Answer.

(c) Deny the allegations of sub-paragraph (c) of paragraph 7 of the Amended Answer; allege that during 1970 petitioner Robert J. Kowalski received $1,697.54 from the State of New Jersey as commutation of rations.

(d) Deny the allegations of sub-paragraph (d) of paragraph 7 of the Amended Answer; allege that $326.45 was included in petitioner Robert J. Kowalski's Form W-2 for 1970 with respect to commutation of rations.

(e) Deny the allegations of sub-paragraph (e) of paragraph 7 of the Amended Answer.

(f) Deny the allegations of sub-paragraph (f) of paragraph 7 of the Amended Answer.

(g) For lack of knowledge or information sufficient to form a belief as to the truth thereof, deny the allegations of sub-paragraph (g) of paragraph 7 of the Amended Answer.

(h) Deny the allegations of sub-paragraph (h) of paragraph 7 of the Amended Answer.

(i) Deny the allegations of sub-paragraph (i) of paragraph 7 of the Amended Answer.

8. Deny generally each and every allegation of the answer not hereinabove specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the relief sought in the Amended Answer be denied, that the Court determine that there is no deficiency in income taxes of the petitioners for the year 1970 and that the Court grant to the petitioners such other and further relief as to the Court may seem just, including a determination of any overpayment that may have been made.

Dated: April 4, 1974

/s/ Carl B. Cordes
CARL B. CORDES
Counsel for Petitioners
Battle, Fowler, Lidstone,
Jaffin, Pierce & Kheel
280 Park Avenue
New York, New York 10017
(212) 986-8330

UNITED STATES TAX COURT

Docket No. 112-73

ROBERT J. KOWALSKI AND
NANCY A. KOWALSKI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

STIPULATION OF FACTS

It is hereby stipulated that, for the purposes of this case, the following statements may be accepted as facts and that all exhibits attached hereto and made a part hereof may be accepted as authentic; provided, however, that either party may object to the admission of such facts and exhibits in evidence on the grounds of materiality and relevancy, and either party may introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The petitioners' legal residence on January 2, 1973, the date of the filing of the petition in this case, was 33 Armstrong Drive, Clark, New Jersey 07066.

2. The taxable year here involved is the calendar year 1970.

3. The petitioners, husband and wife, filed their joint Federal Income Tax Return, Form 1040, a copy of which is attached hereto and made a part hereof as Joint Exhibit 1-A, with the Internal Revenue Service Center, 16601 Roosevelt Boulevard, Philadelphia, Pennsylvania 19155.

4. The respondent in his notice of deficiency, a copy of which is attached hereto and made a part hereof as Joint Exhibit 2-B, determined a deficiency in the amount of $69.54.

5. Respondent filed an amendment to answer in this case alleging an increase in the deficiency, in the amount of $261.16 for a total deficiency of $330.70.

6. In 1970, the petitioners paid $330.00 for medicine and drugs, $311.00 for insurance premiums for medical care and $433.00 for other medical and dental expenses for themselves and their dependents, none of which amounts were compensated by insurance or otherwise.

7. During all of 1970, petitioner Robert J. Kowalski (hereinafter referred to as "petitioner") held the rank of trooper with Division of State Police of the Department of Law and Public Safety of the State of New Jersey. The New Jersey State Police was created by act of the legislature of New Jersey on March 29, 1921. Attached hereto and made a part hereof as Joint Exhibits 3-C and 4-D, respectively, are copies of (i) relevant portions of Chapter 17B of Title 52 of the New Jersey Statutes Annotated, relating to the Department of Law and Public Safety, and (ii) all of Title 53 of the New Jersey Statutes Annotated, relating to the Division of State Police.

8. The head of the Department of Law and Public Safety is the Attorney General of the State of New Jersey, who is appointed by the Governor. (N.J.S.A. 52-17B-2). The executive and administrative head of the State Police is the Superintendent of State Police. (N.J.S.A. 53:1-1). The Superintendent is also appointed by the Governor. (N.J.S.A. 53:1-2). The Superintendent, with the approval of the Governor, makes all rules and regulations for the discipline and control of the State Police, and provides the necessary preliminary and subsequent instructions to the troopers in their duties as police officers. (N.J.S.A. 53:1-10). The Superintendent is authorized to provide for the payment of commutation of rations and quarters to members of the State Police not provided with rations and quarters by the State. (N.J.S.A. 53:3-12).

9. The Superintendent of State Police is popularly referred to as "Colonel". Below him in rank is the Deputy Superintendent who has the statutory rank of major. The remainder of the State Police is made up of men with the statutory ranks of captain, lieutenant, sergeant and trooper. There are approximately 1700 members of the State Police, of whom approximately 1050 are troopers.

10. All troopers must meet various physical, mental and moral character requirements, must take an oath of office, may "enlist" and "re-enlist" for successive periods of two years each and at the end of five years receive tenure in office.

11. A trooper is on duty or subject to call, according to the rules of the State Police, twenty-four hours a day, seven days a week and three hundred sixty-five days a year. Troopers may not engage in any other business or employment except on written permission of the Superintendent.

12. Prior to July 1, 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the State.

13. Troopers sometimes spent half an hour traveling from patrol post to a meal station for meals, a like period of time to eat, and a further like period of time in returning to patrol posts.

14. In the instances where a trooper was on patrol or call and unable to get to a meal station, he would secure his meals at a public eating place, pay for them and submit a voucher for reimbursement from the State.

15. Effective July 1, 1949, the State stopped furnishing meals and began a "maintenance allowance" system. Attached hereto and made a part hereof as Joint Exhibit 5-E are Operations Orders of the Superintendent relating to the maintenance allowance system.

16. If Major William O. Nichol, Deputy Superintendent when the maintenance allowance system was adopted, was present, he would testify that, prior to adoption of the maintenance allowance system, he conducted a survey of states neighboring New Jersey, such as New York, Pennsylvania and Maryland, and learned that the State Police of those States were furnishing allowances to troopers in lieu of providing meals to troopers. The amount originally provided to New Jersey state troopers was $3.00 per day.

17. At all times herein involved petitioner was a trooper in good standing. He originally joined the State Police on August 1, 1960 and "re-enlisted" in 1962 and

again in 1964, and during the term of his second "re-enlistment" petitioner received tenure.

18. During the year in issue, petitioner received the sum of $10,436.92 from the State of New Jersey. This amount is comprised as follows:

(a) "Salary" (included on Form W-2)		$ 8,739.38
(b) "Commutation of rations" as provided for by N.J.S.A. 53:3-12 (included in petitioner's W-2)	$ 326.45	
(c) "Commutation of rations" as provided for by N.J.S.A. 53:3-12 (not included in petitioner's W-2)	1,371.09	
(d) Total "Commutation of rations" received in 1970		1,697.54
(e) Total Amount received in 1970		$10,436.92

19. Of the $10,436.92 described in paragraph 18, above, petitioner included $9,065.83 on his 1970 Federal Income Tax Return. The $9,065.83 consisted of the amounts described in paragraphs 18(a) and (b), above.

20. Petitioner did not include as gross income the amount of $1,371.09 as described in paragraph 18(c), above.

21. Petitioner was not required to submit expense vouchers or receipts for meals purchased while on duty.

22. Omit.

23. Before the autumn of 1970 the State of New Jersey did not deduct and withhold any tax on the commutation of rations allowance of troopers. In the autumn of 1970 the State of New Jersey began so to deduct and withhold.

24. During the year 1970 commutation of rations was paid to the New Jersey State Police as follows:

Troopers and Non-Commissioned Officers	$1,740.00
Lieutenants and Captains	$1,776.00
Majors	$1,848.00
Colonel	$2,136.00

/s/ Carl B. Cordes
Counsel for Petitioners

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

By: /s/ Gerald Backer
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UNITED STATES TAX COURT

Docket No. 112-73

ROBERT J. KOWALSKI AND
NANCY A. KOWALSKI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SUPPLEMENTARY STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true subject to the rights of the parties to object on main brief or reply brief to any or all portions of said stipulation and attached exhibits on the grounds of relevancy and materiality.

25. Attached hereto and labelled petitioner's Exhibit 11 is a copy of the testimony of Major William O. Nicol, Deputy Superintendent of the New Jersey State Police in 1949, since deceased, taken during the proceedings before the Tax Court of the United States on January 28, 1953 in the case of Robert H. Saunders v. Commissioner of Internal Revenue Service, Docket No. 40229. This testimony is stipulated to be part of the record in this case and it is further stipulated that such testimony is that of a witness called by the petitioner.

26. During 1970 the staff of the New Jersey State Police was approximately as follows:

Trooper	911
Trooper 2	96
Trooper 1	30
Sergeant	174
Detective Sergeant	93
Detective Sergeant First Class	33
Staff Sergeant	53
Staff Sergeant First Class	39
Lieutenant	50
Captain	17
Major	5
Superintendent	1
TOTAL	1,502

27. The men were assigned either to troops A, B, C, D, E, Atlantic City Expressway or Division Headquarters as follows:

	A	B	C	D	E	ACE	DH
Trooper	190	192	210	112	79	16	112
Trooper 2	12	28	15	11	13	0	17
Trooper 1	2	5	8	2	6	0	7
Sergeant	32	34	32	13	12	4	47
Detective Sergeant	14	10	15	5	3	0	46
Detective Sergeant First Class	3	4	3	1	1	0	21
Staff Sergeant	14	15	15	3	3	0	3
Staff Sergeant First Class	3	3	2	2	2	0	27
Lieutenant	5	5	5	3	3	1	28
Captain	1	1	1	1	1	0	12
Major	0	0	0	0	0	0	5
Superintendent	0	0	0	0	0	0	1

27

28. With the exception of the men with the rank of sergeant first class and above, the members of Troops A, B and C lived in barracks and worked various shifts as dictated by the exigencies in the area of their station. The men with the rank of sergeant first class and above who were in Troops A, B and C did not live in the barracks and normally, but subject to special assignments, worked 8-hours each day after which they were free to return to their residences; these men are normally assigned to administrative duties at troop headquarters and normally, but subject to special assignments, work 5 days on and 2 days off.

29. The men assigned to Troops D, E and the Atlantic City Expressway did not live in barracks and normally, but subject to special assignments, worked 8-hours each day after which they were free to return to their residences. These men were assigned primarily to toll roads and normally, but subject to special assignments, worked 6 days on and 2 days off.

30. The men assigned to Division Headquarters with the rank of sergeant first class and above are normally assigned to administrative duties and did not live in the barracks and normally, but subject to special assignments, worked 8-hours each day after which they were free to return to their residences. They normally, but subject to special assignments, worked 5 days on and 2 days off.

31. The men assigned to Division Headquarters below the rank of sergeant first class did not live in the barracks and were free to return home after their day's work was completed. The hours these men worked during the day could fluctuate depending on the case or detail they were assigned to.

32. The men who lived in the barracks were free to return to their residences when given passes or when on vacation.

33. All members of the New Jersey State Police received commutation of rations *i.e.*, Trooper, Trooper 2, Trooper 1, Sergeant, Detective Sergeant, Detective Ser-

geant First Class, Staff Sergeant, Staff Sergeant First Class, Lieutenant, Captain, Major; Superintendent.

/s/ Carl B. Cordes
CARL B. CORDES
Counsel for Petitioner

DATED: 7/15/74

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

By: /s/ _____
GERALD BACKER
Staff Assistant to the
Regional Counsel
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970 Broad Street—Room 904
Newark, New Jersey 07102
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DATED: _____

[79] EXHIBIT 11

WILLIAM O. NICOL

was called as a witness for and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

THE CLERK: Will you state your name and address for the record, please?

THE WITNESS: William O. Nicol, Trenton, New Jersey.

DIRECT EXAMINATION

BY MR. GUTKIN:

Q Major Nicol, you are presently employed by the New Jersey State Police, are you not?

A Yes, sir.

Q In what capacity?

A Deputy superintendent.

Q How long have you been connected with the State Police?

A Since 1921, when the State Police started.

Q Would you describe some of your background and your connection with the state police and your origins with the state police?

A Well, the background is, I started as a trooper; went all through the grades until I reached the present position of deputy superintendent.

My position almost from the start was to select quarters, stations and so forth, for the troopers in New Jersey.

[80] Q Did you participate in any manner in the fixing of allowances for troopers?

A Yes, sir, I did. We had a very bad situation. The system we had was to hire a private house and have the people in the house—when I say "hire a private house", it was all over the state in approximately 30 different locations about 15 or 20 miles apart, and it was very unsatisfactory for the reason that the board house mistress would have meals, so-called hot meals set up, and

insisted that the troopers be there at that time; and the troopers, of course, being policemen, would come in maybe an hour and a half later and the meals would be cold.

In fact, I had a headache practically all the time that system was in.

So we looked around for some way to correct it, and the former superintendent, Colonel Shoeffel, asked me to contact neighboring states.

We contacted New York State, Pennsylvania, and Maryland, and found that they had somewhat the same headaches we had, and they were allowing different prices for the troopers that were not eating at fixed stations.

So, for example—do you want us to name the prices or just approximately—

Q How you arrived at—

A New York State was very liberal but some of the other [81] states were not so liberal, and we struck a figure at $3.50.

Q $3.50 per day?

A Per day. When the colonel—the reason I say that: It is more or less certain--part hearsay—but we conferred before the colonel went down to talk with the Governor and the budget director and he asked for $3.50 a day, but they claimed the budget could not stand that, so we cut it down to $3 a day.

Q Under the old system prior to the change from feeding at the regular stations, what were some of the problems?

A Well, I will say this way: I was what they call a troop commander. That would be a region commander today. And I had the headaches. The headquarters at Trenton would ask why the activities were not kept up and so forth.

We tried to insist and tried every method to try to get the men to spread their meal hours so they would cover the so-called districts or the area, and it was impossible to have the men do that.

We threatened to give them reprimand slips, and everything else. That was one of the reasons we did make the survey, to try to correct that.

Q And this change was made for what purpose?

A I would say it was primarily made to give the state a better coverage all through the state and have the men eat [82] there when they should be there, because, for instance, at this time of night, as we all know, the traffic starts rolling heavy and other crimes are committed; and this is about the time the boys would be thinking about going in for their supper and that would be a period of maybe an hour and a half or two hours when mostly they would not be there.

Q Under the present system what do you find?

A I find on the present system it reflects to the benefit of the state to have the men almost continuously out there, rotated so that they are out there.

Under the old system we could not do that, although we tried with orders and rules and everything else, and we could never get it to work.

Q Does it cost any more or any less at the present time than before?

A I would say it cost—it is a benefit to the state from the financial point, because it did cost considerably more in the old days.

We had to hire cooks, chefs and have our own cars transport food back and forth from, for instance, Atlantic City to Hammondton, a distance of approximately 30 miles. That called for a trooper going back and forth almost every day with state transportation.

Q Was it ever the proposal to give troopers additional compensation through this $70 a month allowance?

[83] A No, sir. Compensation did not come into the picture as far as I knew of. It was just for the benefit of the state. Nobody thought of compensation. The thought was—we were very anxious—I might say we are proud of the state police work, and we want to give the citizens of the state the best job we could do and I think we have done it as far as we are concerned.

Q Did the efficiency of the state police increase as a result of the change?

A I believe so. In fact, from my own personal knowledge, I would say yes, it had, because I was right in the

field and saw the operation of this one system as against the other.

MR. GUTKIN: You may cross-examine.

CROSS-EXAMINATION

BY MR. HOPKINS:

Q Major, you stated that you tried a number of systems prior to the one now under operation?

A No; I think you misunderstood. I don't remember saying that.

Q I am sorry. I thought you did. I thought you said that you attempted to—

A No. I did say we tried by different rules and orders and everything to keep the men out on the road instead of having them all in at supper time. It was almost impossible, because the boys were after the hot meals.

[84] You tell them to—one man to come in at 5 o'clock and the other fellow to come in at 7; the boarding house mistress would growl because she said the stuff all gets cold, and it was very unsatisfactory.

Q That is what I meant, Major. You tried a number of different systems of keeping the men on the road?

A By rules and orders.

Q By rules and orders, naturally, yes.

A It did not operate.

Q You found they were unsuccessful; is that correct?

A That is right. In fact, as I say, I am in that from the start and we had this Colonel Schwartzkopf—he is a general now—he was very military. Everything was very military. In fact, he would fire some of us at the drop of a hat because he thought he was in the army or something; or go to the guardhouse.

It was very military at the start. In fact, the first five years it was almost—I have been in the army and I know what it was. I think it was even stricter than the army. I am saying that not for any effect, but just because it is a fact.

Q That was not very good for personnel, was it, Major?

A For the Judge's information, General Schwartzkopf was that way until he got married and got a couple of kids, and then he softened up.

MR. GUTKIN: I think we would prefer to have that [85] off the record.

THE WITNESS: I would tell that to General Schwartzkopf.

BY MR. HOPKINS:

Q Major, to get back to what we were talking about. By the term "system", you meant a number of different—

A I would not say we tried different rules. We tried to impress upon the men the importance of somebody being out there.

Q Didn't you attempt to keep—

A It might work for three days and the next thing the inspector would go around and find the same thing back where it was.

Q Didn't you attempt to keep a man on duty at all times on a particular patrol road?

A We tried to but it did not work.

Q Let's take now the Whitehorse Turnpike. Does that run through your jurisdiction?

A Yes.

Q Let's say on Sunday afternoon coming from Atlantic City and Ocean City down, that way, it is very heavily patrolled, is it not?

A It was.

Q Very heavily travelled?

A For about 25 years it was, but now they have three or four highways. There was just the one highway going into Atlantic City.

[86] Q Is the Blackhorse Turnpike more heavily travelled?

A That is right.

Q So we will substitute the Blackhorse Turnpike.

A That is right.

Q About five to six o'clock on a Sunday afternoon you just could not take all troopers off that road, could you?

A That is it. We would call that an emergency situation. A better example might be down around Keyport area, with everybody going down to the Jersey shore, piles across the bridges there on a Sunday night, say from 5 o'clock until nine, it is almost impossible to move on that bridge.

We call that practically a special emergency detail, and that is just seasonal.

Q Let us consider a situation that we won't consider an emergency detail but a fairly heavily travelled route under the situation as it existed prior to this particular regular operations order allowing the troopers to take their meals on the road and being reimbursed monthly: A situation in which a route was heavily travelled—

A Say the Whitehorse Turnpike.

Q —would be such as to make it very dangerous if the troopers were not there at that time, wouldn't it?

A Yes.

Q Now, what did you do then in a situation of that nature? Did you declare an emergency every time there was [87] a fairly traffic jam?

A Just in passing, the Whitehorse Pike was a little different because Hammondton is almost in the center of the Whitehorse Pike. There we had the kitchen and regular kitchen employees. That is not the general line in the state. But right now we have probably, offhand I would say half a dozen or more we call real tough places for traffic; This Keyport I spoke of and several places in North Jersey.

Q What did you do prior to this new set-up?

A Well, unfortunately there was no provision made for the boys to eat other than when they could get back at the regular feeding time.

Q Didn't you attempt to rotate them, as you say, one eat at 5 and the other at 6:30? Isn't that what you were trying to do?

A The boarding house people would not stand for it. The reason I say that—I am not trying to color this—but we had very difficult—we had a lot of difficulty in getting people to take the troopers in, because they had to stay right there almost all the time and take care

of them; and they claimed there wasn't enough money in it for them.

They didn't want to be bothered with this stuff of one man coming in at five o'clock and another coming in at 6:30 or 7 o'clock. We had an awful time.

When we let go of one place and tried to put ten troopers [88] in, it is hard as the dickens to try to find a building that you can quarter ten troopers.

Q I realize how difficult that must have been, Major, but it was attempted as the only means at that time, was it not?

A I don't understand what you mean by "attempted".

Q Didn't you attempt to keep the road patrolled even though you were unfortunate under the system under which you worked?

A The thought was there and we did tell the men they should be out there, but that is as far as we could get.

Q You tried to do a good job under the situation as set up; is that not correct?

A That is right.

Q Even so far as you stated in direct examination, threatening to put what type of slips—

A Reprimand slips.

Q Reprimand slips in their folders?

A If you are talking about some time back—

Q Yes, I understand.

A At one time it was so involved we cut the men down to two meals a day, so that is how we were trying to help the citizens out, which was not fair to anybody, but the main purpose of this whole set-up—I went to, as I said, different states, and the whole purpose was to keep the men out on the [87] road where they would be of some service to the state and the citizens. That is the only purpose of the change.

Q And you found the troopers lived a more happy life under the system as it is now?

A It is like the army. They are always griping. You can't keep them happy.

Q I know what you mean, Major. However, there are gripes and less serious and more—

A I think it is more satisfactory to the trooper to know that he has at least $3 that he can go out and buy a meal. Under the old system invariably the men would go without a meal and the first thing, you would have a fellow with ulcers or something else on your hands.

MR. HOPKINS: Yes, that is merely what I was interested in, Major. Very well, that is all.

MR. GUTKIN: No further questions.

The petitioner rests.

[90] (Witness excused.)

Thereupon,

WILLIAM O. NICOL

was recalled to the stand by and on behalf of the Petitioner, and having been previously duly sworn, was examined and testified further as follows:

REDIRECT EXAMINATION

BY MR. GUTKIN:

Q Are you familiar with the order?

A No, sir, I am not.

Q I thought—

A Captain Mitchel was misinformed. I am not familiar with this at all. See, just for explanation, Colonel Schoeffel was the superintendent at this time, but Major Snook, who drew this order, was the executive officer, and it was drawn up between those two gentlemen.

Q Any other people participate?

A Well, they had the discussion between themselves. The survey was made by me, but this particular order was due to him being an executive officer, handled these orders to the troopers. We call it the road.

Q Did you in any way participate in any discussions [91] leading to the preparation of the order?

A No, I did not—not this order—the subject matter I probably did.

Q Well, by that I mean the subject matter of the order. I don't mean necessarily the writing.

A As I stated before to counsel, I did participate in a survey made to arrive at the amount of the meals we were supposed to get.

Q And did you participate in the recommendations made for the allowance?

A Yes; in the discussion of what it should be—$3.50.

Q Did you make any recommendations as to the permanency of this change or as to the—

A Yes, I did. I recommended that we do the same as New York and give them $4 a day, if that is what you mean.

Q How about the duration of it? Did you have any—

A Yes, I said it should go in.

Q As a permanent matter or on an experimental basis?

A Well, everything we do in the state police, even promotions, we put on a so-called temporary experimental basis, even the promotion of captain or anybody else. That is the procedure we generally work, regardless of what it is. I don't want to take too much time—even buying an automobile, if we go into a different automobile, we try it for the life of the [92] car and if we change, we will change. The same applies to almost anything we do.

Q Were you, as one of the officers of the state police, interested and anxious to have the change work?

A Yes, I was.

Q Were you interested in impressing on the members of the state police, the troopers, the necessity of making the order work?

A Yes; because it was something new and we wanted the men to realize what it was, that it was for the benefit of the state, what this system was, to increase their activities and reflect from their activities to the benefit of the state.

Q Did you feel that a so-called selling job should be done with the troopers to make this order work?

A Yes, sir; we have to do that with all our orders practically.

MR. GUTKIN: No further questions.

MR. HOPKINS: No further questions.

THE COURT: Witness is excused.

UNITED STATES TAX COURT

Docket No. 112-73

ROBERT J. KOWALSKI AND
NANCY A. KOWALSKI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DECISION

Pursuant to the opinion of the Court filed October 14, 1975, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1970 in the amount of $113.12.

/s/ Irene F. Scott
Judge

Entered: Jan. 6, 1976

• • • •

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either

party to contest the correctness of the decision entered herein.

/s/ Carl B. Cordes
Counsel for Petitioners

DATED: 12/11/75

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

By: /s/ Agatha L. Vorsanger
AGATHA L. VORSANGER
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Tel. No. 201-645-3896

DATED: [Illegible]

SUPREME COURT OF THE UNITED STATES

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI, ET UX.

ORDER ALLOWING CERTIORARI. Filed March 28, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 233542 86

Supreme Court, U. S.
FILED
MAR 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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General American Investors Co. v. *Commissioner*, 348 U.S. 434 (1955) 13, 14

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Wilson v. *United States*, 412 F. 2d 694 (1st Cir. 1969), *aff'g Wilson* v. *United States*, 292 F. Supp. 200 (D.N.H. 1968) 6, 7, 8

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Treasury Decisions and Rulings:

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Congressional Reports:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTION PRESENTED

Whether a noncompensatory cash meal allowance paid to a state police trooper for the convenience of his employer is includible in gross income under Section 61 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 61 and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and the Treasury Regulations, Sections 1.61-2 and 1.119-1 (26 C.F.R.) are set forth in the Appendix hereto, pp. 1A-7A.

STATEMENT OF THE CASE

At all relevant times respondent[1] was a trooper with the Division of State Police of the Department of Law and Public Safety of the State of New Jersey (hereinafter "State Police"). He originally joined the State Police in August 1960 and reenlisted in 1962 and 1964. During his second term he received tenure, and at all times he was a trooper in good standing with the State Police. (Pet. App. A, pp. 2A-3A.)

The State Police, created by act of the New Jersey legislature on March 29, 1921, is responsible statewide for all police functions and has primary responsibility in those areas of the state not within the jurisdiction of local authority. It also assists local police departments. (Pet. App. A, p. 3A.)

The executive and administrative head of the State Police is the Superintendent of State Police (hereinafter "Superintendent"). He is appointed by the Governor of the State. The Superintendent, with the approval of the Governor, makes all rules and regulations for the discipline and control of the State Police. The Superintendent is authorized to provide for the payment of commutation of rations (hereinafter "meal allowance") and quarters to those members of the State Police not provided with rations and quarters by the State. (Pet. App. A, p. 3A.)

The State Police, organized along military lines, is headed by the Superintendent who holds the rank of colonel. Below him in rank is the Deputy Superintendent who has the statutory rank of major. The remainder of the State Police is comprised of men with the statutory ranks of captain, lieutenant, sergeant, and trooper. In 1970 there were approximately 1,500 people in the State

1. References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year at issue.

Police, of whom approximately 900 were troopers. (Pet. App. A, p. 3A.)

Prior to July 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the State. In those instances where a trooper was unable to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the State. Despite various efforts at enforcing this system, it proved unsatisfactory. Each trooper would have to leave his patrol area unguarded for approximately an hour and a half to enable him to travel to his meal station, to eat his meal and to return to his post. Efforts aimed at staggering eating periods proved unworkable and drew complaints from the individuals in charge of the eating stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the State discontinued its meal operations and instituted a meal allowance system. (Pet. App. A, pp. 3A-4A.)

This system provided for a daily meal allowance for all members of the State Police while they were on active duty. In 1970 the meal allowance rate for troopers was $1,704[2] and this amount was paid without adjustment except for leave for military training. All troopers are entitled to the same meal allowance regardless of years in service or the actual amount of time spent on active duty. Their salaries increase with their length of service. (Pet. App. A, pp. 4A-5A.)

Meal allowance money and troopers' salaries are separately accounted for in the State Police's accounting system. Funds are never commingled between the salary account and the meal allowance account. The meal allowance is paid biweekly in advance and the salaries are paid biweekly in arrears. These amounts are separately stated on the troopers' biweekly checks. (Pet. App. A, p. 4A.)

2. Although respondent was entitled to $1,704 in meal allowance money, he received only $1,697.54. This slight difference is not relevant. (Pet. App. A, p. 4A, n.2.)

The meal allowance system was adopted to provide the State and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation. (Pet. App. A, p. 5A.)

Under this system the troopers are expected to eat at a public eating place within their assigned patrol area. Troopers are not permitted to accept any free meals. Before eating, a trooper must first check in with the officer in charge of his station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating. A trooper is subject to call during the eating period. Such calls are not an uncommon experience. (Pet. App. A, p. 5A.)

No restrictions are placed on a trooper's use of his meal allowance. A trooper is not required to account to the State for his meal expenses. A trooper may eat at home if it is within his assigned patrol area and if he receives permission to do so, or he may bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals. (Pet. App. A, p. 5A.)

State Police recruits are told that, in addition to their salary, a meal allowance will be paid to them in cash, which is in lieu of the State's furnishing meals they are required to eat while they are on active duty. The meal allowance is also a subject of negotiations between the State and the troopers' union. (Pet. App. A, p. 5A.)

A trooper is on active duty when he is in uniform performing his official duties. A trooper, however, is on call 24 hours a day and his actual active duty time is determined by the manpower needs of the station to which he is assigned. It is the policy of the State Police to give every man a broad scope of experience by giving him various assignments as operations permit, and during 1970

respondent had several different assignments. (Pet. App. A, p. 6A.)

Respondent was required to keep a record of his activity for each 24-hour period. Based on these records respondent spent 200 nights away from home on active duty. While on active duty he spent approximately $2 for breakfast, $3 for lunch, and $5 for dinner. Respondent spent the entire amount of his meal allowance for meals while on active duty. (Pet. App. A, p. 7A.)

Respondent reported $9,066 in wages and salaries on his 1970 federal income tax return. This amount included his base salary of $8,739.38 and meal allowance of $326.45[3]. He did not include the remaining $1,371.09 of meal allowance in the tax return. Respondent claimed as a miscellaneous itemized deduction $405 of food maintenance expenses.[4] Petitioner disallowed this deduction, determining that the meal allowance funds were includible as gross income under Section 61 of the Code, and calculated a deficiency of $69.54. (Pet. App. A, pp. 7A-8A.)

Subsequently, petitioner discovered that the remaining $1,371.09 of meal allowance funds received by respondent in 1970 was not included in respondent's tax return. Petitioner filed an Amendment to Answer of respondent's Petition in the United States Tax Court, to which respond-

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3. Prior to October 1, 1970, federal income tax was not deducted and withheld from the meal allowance paid to the troopers based on *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), reversing 21 T.C. 630 (1954). In October 1970 the state began to deduct and withhold the appropriate amounts after correspondence and discussions with the Commissioner of Internal Revenue. Consequently, only $326.45 of respondent's meal allowance was included on his Wage and Tax Statement (Form W-2) for the year 1970. (Pet. App. A, p. 7A, n.3.)

4. Although there is a minor difference between the meal allowance included as salaries and wages in the tax return as income and the amount of the deduction taken by respondent, petitioner does not dispute the correctness of the amount claimed as a deduction. (Pet. App. A, p. 8A, n.4.)

ent did not object, determining that this amount should also be included in gross income. Petitioner accordingly increased the deficiency to $330.70. (Pet. App. A, p. 8A.)

The United States Tax Court held that the meal allowance was includible in income under Section 61 of the Code and was not excludable from income under Section 119 of the Code, but that respondent was entitled to deduct part of the allowance as an expense under Section 162 of the Code. (Pet. App. A, pp. 8A-26A.) The opinion was reviewed by the full Tax Court, and seven judges dissented, including the trial judge, Judge Sterrett, who wrote the principal dissenting opinion. (Pet. App. A, pp. 32A-37A.)

Judge Sterrett (joined by five other judges) dissented on the ground that the meal allowance did not constitute gross income under Section 61 of the Code because, under the long-standing judicial and administrative "convenience of the employer" doctrine, respondent had shown "that it was not compensatory, was required to be received primarily for the benefit of his employer so that he could properly perform his duties, and additionally that it was spent for the purpose paid." (Pet. App. A, p. 37A.) Judge Sterrett's opinion did not reach the issues raised under Sections 119 and 162 of the Code.

The United States Court of Appeals for the Third Circuit reversed *per curiam* on the basis of its prior decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), and on the basis of Judge Sterrett's dissenting opinion in the Tax Court. (Pet. App. B, pp. 38A-41A.)

ARGUMENT

1. Petitioner contends (Pet., pp. 6-7) that the decision below of the Third Circuit conflicts with the decision of the First Circuit in *Wilson* v. *United States*, 412 F. 2d 694 (1st Cir. 1969), in the interpretation of (i) Section 61(a) of the Internal Revenue Code and (ii) Section 119 of the

Code. There is, however, no such conflict, since the decision of the Third Circuit rested solely on Section 61 and the decision of the First Circuit in *Wilson* rested solely on Section 119.

The decision below was grounded on the Third Circuit's prior reasoning in *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954). *Saunders* was decided before the enactment of Section 119 and was based solely on the interpretation of Section 22(a) of the Internal Revenue Code of 1939, the predecessor of Section 61(a) of the Internal Revenue Code of 1954. This Court has held that Section 22(a) of the 1939 Code and Section 61(a) of the 1954 Code are identical in scope. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).

The decision below was also grounded on the reasoning of Judge Sterrett's dissenting opinion in the Tax Court, which was also based solely upon an analysis of Section 61 of the Code. The court below did not reach the issues raised under Section 119, because its holding under Section 61 was dispositive. The court below aligned itself in result only with the Fifth, Eighth and Tenth Circuits (Pet. App. B, p. 41A), which have ruled that meal allowances paid to state troopers are excluded from gross income under Section 119 of the Code.

The decision in *Wilson*, on the other hand, was based solely on Section 119. In *Wilson*, the First Circuit affirmed a decision of the United States District Court for the District of New Hampshire, [*Wilson* v. *United States*, 292 F. Supp. 200 (D.N.H. 1968)], where the opinion stated in its opening paragraph:

> "At the outset, the Court wishes to state emphatically that our decision is limited to the issue presented to us: whether the reimbursements received by the taxpayer are excludable from his gross income *under Section 119 of the Internal Revenue Code of 1954*." 292 F. Supp. at 203. (Emphasis in the original.)

The opinion of the First Circuit in *Wilson* was confined to a consideration of the technical requirements of Section 119. The First Circuit assumed, without analysis, that the payments were income under Section 61 of the Code, presumably because no issue had been presented to the Court under Section 61.

Thus, the reasoning of the court of appeals below does not conflict with the reasoning of the court of appeals in *Wilson*, because the two courts considered two different sections of the Code. The only conflict is in result, and even that conflict may never have arisen if the First Circuit had been asked to consider Section 61 of the Code. Accordingly, it would be premature to grant the writ in the present case.

2. Petitioner next contends (Pet., pp. 8-10) that the meal allowance cannot be excluded from income under Section 61 of the Code through application of the "convenience of the employer" doctrine applied in *Saunders*, because that doctrine is now exclusively confined to Section 119 of the Code. In support of this contention, petitioner relies primarily on this Court's decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). The petitioner's argument misconstrues the "convenience of the employer" doctrine, the relation of Section 119 of the Code to that doctrine and this Court's view of the scope of Section 61 of the Code. Moreover, the petitioner's argument, if adopted by this Court, would nullify several of the petitioner's own regulations and rulings.

The "convenience of the employer" doctrine holds that gross income does not include the value of meals or lodging provided to an employee by his employer if the meals or lodging are provided *for the convenience of the employer* and *not as additional compensation* to the employee. The origin of this doctrine dates back to the early years of the income tax. It has been embodied in the income tax regu-

lations since 1920. T.D. 2992, 2 Cum. Bull. 76. In the same year, the Bureau of Internal Revenue ruled in O.D. 514, 2 Cum. Bull. 90 (1920), that:

> "'Supper money' paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to the salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee."

This ruling, which is quoted in full, established early and clearly that it is immaterial whether the value of a meal is provided in cash or in kind, as long as the meal is not compensatory and is provided for the convenience of the employer. It should be noted that the quoted ruling does *not* require that the employee actually spend the supper money for supper. This ruling has been in full effect for more than half a century.

The first judicial recognition of the "convenience of the employer" doctrine occurred in *Jones* v. *United States*, 60 Ct. Cl. 552 (1925). In that case, the court held that neither the value of quarters nor the commutation in lieu of quarters furnished to a military officer constituted income, since neither was intended as or paid as additional compensation and since they were required for the proper performance of his duties.

The rationale of the *Jones* decision was incorporated and expanded in the income tax regulations. It is now included in Section 1.61-2(b) of the Treasury Regulations, which provides in relevant part as follows:

> *"Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service.* Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey and Public Health Service of the

> United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income."

It is significant that this regulation is promulgated under Section 61 of the Code, which defines gross income. *There has never been any specific statutory exclusion for amounts received by the hundreds of thousands of such personnel as subsistence and commutation of quarters.* It is also significant that the regulation extends to the Public Health Service, even though it is a part of the Department of Health, Education and Welfare rather than part of the military. See 42 U.S.C. Section 202.

By 1950, the "convenience of the employer" doctrine had evolved so as to be applied administratively:

> ". . . only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered." *Mim. 6472,* 1950-1 Cum. Bull. 15.

Thus, on the eve of the consideration and enactment of the Internal Revenue Code of 1954, it was the position of the Bureau of Internal Revenue that the "convenience of the employer" doctrine was not to be applied in situations where the employee's receipt of benefits was compensatory. In this context, Congress enacted the present Section 119 as part of the Internal Revenue Code of 1954. Section 119 excludes from an employee's gross income the value of meals provided to him by his employer for the convenience of the employer on the business premises, whether or not compensatory.

While Section 119 was the first specific legislative inclusion of the "convenience of the employer" doctrine, it was

not intended to preempt the field. The purpose of Section 119 was to carve out a safe harbor where the value of meals and lodging furnished for the convenience of the employer would be excluded from the gross income of the employee *even if* the meals and lodging were compensatory. See *H.R. Rep. No. 1337,* 83d Cong., 2d Sess. 18 (1954); *S. Rep. No. 1622,* 83d Cong., 2d Sess. 19 (1954). The Senate Finance Committee Report stated:

> "Under section 119 as amended by your committee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation.
>
> "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income *to the extent that* such allowances constitute compensation." *S. Rep. No. 1622,* 83d Cong., 2d Sess. 190-191 (1954). (Emphasis added.)

From the foregoing it is clear that Section 119 was not intended to displace what has been described as the "common law 'convenience of the employer' test". 1 Surrey *et al., Federal Income Taxation,* 130 (1972). The regulations under Section 119 also recognize the non-exclusivity of that section. Treasury Regulations, Section 1.119-1(c)(2). Thus, under both the Senate Finance Committee Report and the Treasury Regulations, cash allowances for meals are includible in gross income *only if* they are compensatory.

More recently, the Treasury Department has reaffirmed the common law nature of the Code's definition of gross income in a Treasury Department document entitled "Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits," 1976 CCH Stand. Fed. Tax Rep. ¶ 8907, P-H 1976 Fed. Taxes ¶ 65,667, (Office of the

Assistant Secretary for Tax Policy, September 2, 1975), which states:

> "With the definition of 'income'—as in the case of other broad concepts such as 'due process' or 'equal protection'—most of the law must be discovered in a study of the ways in which the language has been interpreted. Thus, for example, official interpretations outstanding for decades hold that such things as travel passes for railroad employees or supper money for employees who work overtime are not to be included in income." 1976 CCH Stand. Fed. Tax Rep. ¶ 8907, at p. 77,371.
>
> "The Internal Revenue Code as presently interpreted by the regulations and the better reasoned case law requires more than a finding that an employee enjoyed an economic benefit. Section 61(a)(1) of the Code speaks of 'compensation *for* services'." Id. at p. 77,375. (Emphasis in the original.)

Thus, the "convenience of the employer" rule, which has been recognized both judicially and administratively for more than five decades, holds that the gross income of an employee does not include a meal allowance paid to him by his employer if (i) the allowance is noncompensatory, because it is (a) not intended as compensation and (b) not charged to the salary account, and (ii) the allowance is paid for the convenience of the employer. The petitioner asserts (Pet., pp. 8-10) that this rule does not apply to the respondent's meal allowance. In support of this assertion, the Commissioner relies on *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).

In *Glenshaw Glass,* this Court held that punitive damages for fraud and antitrust violations constituted gross income to the recipient on the ground that there was no evidence of congressional intent to exempt such payments from the broad scope of "income" within the meaning of Section 22(a) of the Internal Revenue Code of 1939, the predecessor of Section 61(a) of the 1954 Code. The case also held

that Section 22(a) of the 1939 Code and Section 61(a) of the 1954 Code are identical in scope in defining "income." In a similar case decided on the same day, *General American Investors Co.* v. *Commissioner,* 348 U.S. 434 (1955), this Court held that "insider profits" recovered by a corporation under the federal securities laws were includible in the gross income of the corporation on the authority of *Glenshaw Glass,* the Court stating:

> "The reasons which dictated that result are equally compelling here. We see no significant difference in the nature of these receipts which might make that ruling inapplicable. • • • There is no indication that Congress intended to exempt them from coverage." (348 U.S. at 436.)

Far from undermining the authority of *Saunders* v. *Commissioner,* 215 F. 2d 768 (3d Cir. 1954), these two cases would appear to reinforce its authority by holding that:

> (i) the meaning of the term "income" is the same in both the 1939 Code and the 1954 Code;
>
> (ii) the "nature of [the] receipts" must be examined to determine what constitutes "income"; and
>
> (iii) the congressional intent must be examined to determine whether a given receipt is to be excluded from "income."

Since "income" has the same meaning in both the 1939 and 1954 Codes, the reasoning of *Saunders* is just as applicable to Trooper Kowalski's meal allowance for 1970 as it was to Trooper Saunders' meal allowance for 1950. Moreover, Congress has expressed in at least two ways its intent to exclude from gross income receipts in the nature of noncompensatory meal allowances paid for the convenience of the employer.

First, Congress has repeatedly enacted Revenue Acts and has twice enacted and repeatedly amended Revenue Codes defining income without limiting the scope of either such administrative rulings as O.D. 514, 2 Cum. Bull. 90 (1920), relating to supper money and quoted in full, *supra*, p. 9, or such cases as *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954).

Second, the legislative history of Section 119, enacted in 1954, makes it clear that the taxability of cash allowances for meals continues to require analysis on a case by case basis. As stated above, Congress enacted Section 119 to provide a safe harbor within which meals might be furnished free of tax, *even if* they were compensatory, so long as the convenience of the employer was served. Congress intended to confine the operation of Section 119 to meals furnished in kind, leaving cash allowances in the position of having to continue to meet *both* conditions of the judicially and administratively evolved test.

Thus, Congress has clearly evidenced its intent to exclude from gross income meal allowances that are (i) paid for the convenience of the employer and (ii) noncompensatory, and the Commissioner of Internal Revenue has implemented this policy in his rulings and regulations. The criteria of *Glenshaw Glass* and *General American Investors* have been met.

On the factual level, there can be no doubt that the meal allowance paid to respondent falls squarely within the "convenience of the employer" doctrine, since the Tax Court found the following as facts:

> "[The meal allowance] system was adopted to provide the State and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation." (Pet. App. A, p. 5A.)

Therefore, since the meal allowance paid to respondent is excluded from his gross income under a long-standing doctrine that in no way conflicts with the decisions of this Court, the writ should be denied. Since the decision below merely reaffirmed the *Saunders* case, decided in 1950, denial of the writ will in no way "invite further attempts by employers to provide tax-free compensatory payments to employees to defray the costs of meals or other personal living expenses," as petitioner warns (Pet., p. 8).

On the contrary, if this Court grants the writ and if the Court then rules in favor of the petitioner, it can reach such a decision only on the ground that cash subsistence allowances constitute gross income. Such a ruling from the Supreme Court of the United States would invalidate Treasury Regulations, Section 1.61-2(b), which excludes from gross income the subsistence and quarters allowances of hundreds of thousands of personnel in the Armed Forces, Coast and Geodetic Survey and Public Health Service of the United States. This, in turn, would subject these allowances to federal income tax, thereby either eroding the benefit to the recipients, with a concomitant loss of morale, or requiring a significant increase in the amount of the allowances in order to give the recipients the same benefit, at enormous expense to the federal government.

3. Petitioner finally contends that the court of appeals erred in holding that the meal allowance was excludable from gross income under Section 119 of the Code. This contention is mistaken because, as explained above, the court of appeals reached its decision solely under Section 61 of the Code and did not reach any issues raised under Section 119.

However, petitioner's contention points up his dilemma. On the one hand, he premises that the "convenience of the employer" doctrine has been confined exclusively to Section 119 since its enactment as part of the Internal Revenue

Code of 1954. On the other hand, he premises that *cash* allowances cannot qualify for exclusion from income under Section 119. The logically necessary conclusion from these premises is that cash allowances cannot qualify for exclusion from income under *any* circumstances. Yet, petitioner's own rulings (*e.g.*, O.D. 514, 2 Cum. Bull. 90) and Treasury Regulations [Sections 1.61-2(b) and 1.119-1(c)(2)] provide for the exclusion of cash meal allowances. Moreover, there is nothing in the legislative history of Section 119 to suggest that cash meal allowances cannot qualify for exclusion from income. To the contrary, the Senate Finance Committee Report cited and quoted by petitioner (Pet., p. 10) makes it clear that cash meal allowances are includible in gross income only to the extent that they constitute compensation. Since petitioner's argument defeats itself, the court of appeals' analysis of the law applicable to this case is irrefutably correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents.

MARCH 1977.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. **Gross Income Defined**

(a) **General Definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

(b) **Cross References.**—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

SEC. 119. **Meals or Lodging Furnished For the Convenience of the Employer**

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if:

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

Sec. 1.61-2 Compensation for services, including fees, commissions, and similar items

(a) In general. (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination of severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

• • •

(b) Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service. Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income. • • •

Sec. 1.119-1 Meals and lodging furnished for the convenience of the employer

(a) Meals—(1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) Meals furnished without a charge. (i) Meals furnished by an employer without a charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the

convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances. In subdivision (ii) of this subparagraph, there are set forth some of the substantial noncompensatory business reasons which occur frequently and which justify the conclusion that meals furnished for such a reason are furnished for the convenience of the employer. In subdivision (iii) of this subparagraph, there are set forth some of the business reasons which are considered to be compensatory and which, in the absence of a substantial noncompensatory business reason, justify the conclusion that meals furnished for such a reason are not furnished for the convenience of the employer. Generally, meals furnished before or after the working hours of the employee will not be regarded as furnished for the convenience of the employer, but see subdivision (ii) (d) and (f) of this subparagraph for some exceptions to this general rule. Meals furnished on nonworking days do not qualify for the exclusion under section 119. If the employee is required to occupy living quarters on the business premises of his employer as a condition of his employment (as defined in paragraph (b) of this section), the exclusion applies to the value of any meal furnished without charge to the employee on such premises.

(ii) (a) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emegencies have actually occurred, or can reasonably be expected to occur in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

(b) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period. For example, meals may qualify under this subdivision when the employer is engaged in a business in which the peak workload occurs during the normal lunch hours. However, meals cannot qualify under this subdivision (b) when the reason for restricting the time of the meal period is so that the employee can be let off earlier in the day.

(c) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (c) when there are insufficient eating facilities in the vicinity of the employer's premises.

(d) A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a substantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.

(e) If the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished to each other employer will also be regarded as furnished for a substantial noncompensatory business reason of the employer.

(f) If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to such employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason.

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

• • •

(c) Rules. (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on

the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals and lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

• • •

Supreme Court, U. S.
FILED
MAR 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1095

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

DANIEL M. FRIEDMAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Respondent argues that the decision below does not conflict with *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1), because that case "was confined to * * * the technical requirements of Section 119" (Br. in Opp. 8), while this case turns on whether the cash meal allowances are "gross income" within the meaning of Section 61(a). But neither the decision below nor the First Circuit's opinion in *Wilson* can be so narrowly read. In aligning itself with the Fifth, Eighth, and Tenth Circuits (Pet. App. B 41A), the court below held that the meal payments qualified for the Section 119 exclusion. Moreover, before the court in *Wilson* considered the applicability of Section 119, it stated: "We start with the proposition that all remuneration received for services is gross income unless it falls within a specific exclusion" (412 F. 2d at 695). Respondent therefore errs in suggesting (Br. in Opp. 8) that the conflict

might never have arisen had the First Circuit considered Section 61.

At all events, the cash allowances at issue in this case are now subject to tax in the First and Fourth Circuits, and not taxable in the Third, Fifth, Eighth, and Tenth Circuits. As a logical matter, the applicability of the statutory exclusion of Section 119 only arises after one concludes that the meal allowances are "gross income" under Section 61(a). Thus, the disparity of tax treatment that now exists in the various circuits can only be eliminated by this Court's resolution of the conflict with respect to both Sections 61(a) and 119. Since the decision below held that the meal allowances were not gross income under Section 61(a) and were otherwise excludable under Section 119, the Court should grant certiorari in this case to establish a uniform national rule with respect to such payments.[1]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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[1]We are serving a copy of this memorandum upon counsel for the respondent in *United States* v. *Smith*, in which our petition for a writ of certiorari is pending (No. 76-1243) with respect to the Section 119 issue.

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BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. A 1A–37A) are reported at 65 T.C. 44. The opinion of the court of appeals (Pet. App. B 38A–41A) is reported at 544 F. 2d 686.

JURISDICTION

The judgment of the court of appeals (Pet. App. C. 42A) was entered on November 11, 1976. The petition for a writ of certiorari was filed on February 7, 1977, and was granted on March 28, 1977 (A. 41). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether cash payments to state police troopers, designated as meal allowances, are includable in their gross income under Section 61(a) of the Internal Revenue Code of 1954, and are not otherwise excludable from income under Section 119 of the Code, which excludes from an employee's gross income the value of meals furnished to him by his employer for the convenience of the employer but only if the meals are furnished on the employer's business premises.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of Sections 61(a) and 119 of the Internal Revnue Code of 1954 (26 U.S.C.) and of Treasury Regulations, Section 1.119–1 (26 C.F.R.), are set forth in the Appendix, *infra,* pp. 1A–5A.

STATEMENT

1. Respondent [1] is a state police trooper employed by the Division of State Police of the Department of Law and Public Safety of the State of New Jersey. During 1970, he received a base salary of $8,739.38, and an additional $1,697.54, designated as an allowance for meals.[2] All New Jersey State Police Troopers are entitled to the same meal allowance regardless

[1] References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year at issue.

[2] Although respondent was entitled to $1,740 in meal allowance money, he in fact received $1,697.54. The discrepancy is not relevant (Pet. App. A 4A, n. 2).

of their length of service (Pet. App. A 2A, 4A, and n. 2, 5A, 7A–8A).

The meal allowance is paid biweekly in advance and is included in the trooper's salary, which is paid for prior periods. The cash allowance for meals is described on a state police recruitment brochure as an item to be received in addition to base salary. The amount of the meal allowance is a subject of negotiations between the State and the police troopers' union (Pet. App. A 4A–5A).

During 1970, the year in question, the amount of the cash meal allowance varied in accordance with the rank of the police officials. Thus, for example, the allowance for troopers, such as respondent, and other non-commissioned officers, was $1,740 per year. However, lieutenants and captains received $1,776; majors received $1,848; and the superintendent received $2,136 (Stip. par. 24, A. 24).

The State of New Jersey instituted the cash meal allowance for its police troopers in July, 1949,[3] Prior to that time, all troopers were provided with actual meals during active duty hours. The meals were served at various meal stations throughout the State. When a trooper was unable to eat at an official meal station, he would eat at a public restaurant and obtain reimbursement from the State (Pet. App. A 3A–4A).

[3] The meal allowance for troopers was originally set in 1949 at $70 per month (Pet. App. A 4A).

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The meal station system proved to be unsatisfactory because the troopers spent too much time in traveling from their duty posts to the nearest meal station and thereby left their posts unguarded. As a result, the State closed its meal stations and established a cash allowance system, in accordance with the practice adopted by several neighboring states (Pet. App. A 4A).

Under the cash meal allowance system, troopers are expected to eat within their assigned patrol area. They must first check in with the officer in charge of their assignment station and request permission to eat. Troopers are subject to call during their meal period. Thus, a trooper must advise the officer in charge where he may be reached while eating (Pet. App. A 5A).

The state places no restrictions on the use of the cash meal allowances provided to the police troopers. They are not required to account to the State for their meal expenses. A trooper may eat at home if he lives within his assigned duty area, eat in a public restaurant, or bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals (Pet. App. A 5A).

On his 1970 income tax return, respondent reported $9,066 in wages. That amount included his base salary of $8,739.38 and cash meal allowances of $326.45. The state included the latter amount on respondent's Wage and Tax Statement (Form W–2) for the year. However, respondent did not report as

income on his 1970 return the remaining $1,371.09 portion of his meal allowance [4] that was not included on his Form W–2. Respondent also claimed $405 of food maintenance expenses as a miscellaneous itemized deduction (Pet. App. A 7A–8A).

On audit, the Commissioner of Internal Revenue disallowed respondent's claimed deduction for food maintenance expenses. Subsequently, the Commissioner discovered that respondent had not reported as income the remaining $1,371.09 of cash meal allowances that was not included on his Form W–2. The Commissioner thereupon determined that such amount was properly includable in respondent's gross income and accordingly increased the deficiency (Pet. App. A 8A).[5]

2. In a reviewed decision, the Tax Court held, with six dissents,[6] that the cash meal payments were in-

[4] The State began to withhold income tax from the cash meal allowances paid to the troopers as of October 1, 1970. Hence, only $326.45 of the total $1,697.54 was reported on respondent's 1970 Wage and Tax Statement (Pet. App. A 7A, n. 3).

[5] The Commissioner raised the issue of includability of the cash meal allowances by amending his answer in the Tax Court (Pet. App. A 8A; A. 15–17). See Section 6214(a) of the Internal Revenue Code of 1954.

[6] Judge Sterrett, joined by five other judges, dissented on the ground that the cash payments were not income under Section 61 (Pet. App. A 32A–37A). In addition, Judge Drennen dissented (Pet. App. A 28A–32A) only with respect to the majority's conclusion (Pet. App. A 24A–28A) that the cost of respondent's meals was deductible as travel expenses under Section 162(a)(2) only to the extent that they were eaten while away from home overnight. See *United States* v. *Correll*, 389 U.S. 299. The propriety of that deduction is not at issue. See n. 7, *infra*.

cludable in respondent's gross income under Section 61(a) of the Internal Revenue Code of 1954 (Pet. App. A 8A–19A). In so ruling, the court relied upon the broad statutory definition of "gross income" in Section 61(a), which provides that "[e]xcept as otherwise provided, * * * gross income means all income from whatever source derived * * *." In the Tax Court's view, its conclusion followed from the decisions of this Court holding that by broadly defining gross income, Congress intended to "tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (Pet. App. A 12A). Although the Tax Court found that the State did not intend the meal allowances to represent additional compensation (Pet. App. A 5A), it concluded that the payment "was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source" (Pet. App. A 13A).

Moreover, the Tax Court unanimously held that the cash payments did not qualify for the exclusion from gross income under Section 119 of the Code (Pet. App. A 19A–24A). That statute provides for an exclusion from gross income for the value of any meals furnished to an employee by his employer for the convenience of the employer, but only if the meals are furnished on the business premises of the employer. In the Tax Court's view, the meal allowances were not excludable under Section 119 because they were cash payments and not meals furnished in kind. It therefore found it unnecessary to consider whether

the payments met the other prerequisites of Section 119 (Pet. App. A 19A).[7]

The court of appeals reversed *per curiam* (Pet. App. B 38A–41A). In holding that the cash meal allowances were not includable in the statutory definition of gross income, the court adhered to its prior decision in *Saunders* v. *Commissioner*, 215 F. 2d 768, reversing 21 T.C. 630, in which it ruled in favor of the New Jersey State troopers with respect to the same cash payments. The court further held that the payments were excludable from income under Section 119, stating: "We * * * align ourselves with the Fifth, Eighth, and Tenth Circuits" (Pet. App. B 41A).[8]

SUMMARY OF ARGUMENT

I

Section 61(a) of the Internal Revenue Code of 1954 states that "[e]xcept as otherwise provided * * *, gross income means all income from whatever source derived * * *." As this Court has repeatedly observed

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[7] The Tax Court also held that respondent could deduct two-thirds of the meal allowance as a business expense because he was "away from home" within the meaning of Section 162(a)(2) of the Code (Pet. App. A 24A–26A). The Commissioner did not appeal that aspect of the Tax Court's decision and it is no longer at issue.

[8] See, *e.g.*, *United States* v. *Barrett*, 321 F. 2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8); and *United States* v. *Keeton*, 383 F. 2d 429 (C.A. 10). See also *Smith* v. *United States*, 543 F. 2d 1155 (C.A. 5), petition for a writ of certiorari pending, No. 76–1243. Contra: *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1); *Koerner* v. *United States*, 550 F. 2d 1362 (C.A. 4), petition for a writ of certiorari pending, No. 76–1539.

with respect to its comparable statutory predecessors, this language was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U.S. 331, 334. The broad catch-all phrase "from whatever source derived" shows that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as their nature." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429–430. Thus, the Court has consistently recognized that it was "the intention of Congress to tax all gains except those specifically exempted" (*id.* at 430).

Under these principles, the unrestricted cash payments to respondent and his fellow New Jersey State Police Troopers to defray the cost of their personal meal expenses fall within the broad reach of the statutory definition of "gross income." The troopers were not required to expend the payments for meals, but could use the money as they saw fit. The payments were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co.*, *supra*, 348 U.S. at 431.

In ruling that the cash payments at issue were not includable in respondent's gross income, the court of appeals adhered to its prior pre-1954 Code decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (C.A. 3), involving the same New Jersey police troopers. But *Saunders* was decided prior to this Court's holding in *Glenshaw Glass Co.* Moreover, *Saunders* rests upon an erroneous analogy to military subsistence allowances, which Congress has long recognized to be exempt from tax. Finally, the "convenience-of-the-employer" rationale, upon which *Saunders* rests, is now confined exclusively to Section 119, which was added at the time of the 1954 codification. *Saunders* therefore is no longer a viable precedent under the 1954 Code. Therefore, cash payments that are not excludable under Section 119 cannot escape taxation on the ground that they are not gross income under Section 61(a).

At all events, even if there is a non-statutory "convenience-of-the-employer" rule that survives the enactment of the 1954 Code, the cash payments at issue would not qualify for exclusion under such a rule because they were not made for the convenience of the employer and were compensatory.

II

The court of appeals' holding that the cash payments designated as meal allowances are excludable under Section 119 is equally erroneous. That provision permits the exclusion from an employee's gross income of "the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer * * *." The use of the terms "value" and "furnished" shows that the statute requires meals to be furnished in kind.

The pertinent legislative history reinforces that conclusion. The Senate Finance Committee Report stated (S. Rep. No. 1622, 83d Cong., 2d Sess. 190–191

(1954)): "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation." Accord: Treasury Regulations, Section 1.119–1(c)(2).

In light of the statutory language and the legislative history, the cash allowances at issue here cannot qualify for exclusion under Section 119. First, the cash payments did not serve the convenience of the employer because they were unrelated to any restrictions that would enhance police protection. Second, cash payments are not, under any stretch of the imagination, meals furnished in kind, and the four courts of appeals that have so held are in error.

Finally, since the troopers consumed these meals in various public restaurants, the statutory requirement that the meals be furnished on the business premises of the employer was not met. See *Dole* v. *Commissioner*, 43 T.C. 697, 707–709 (Raum, J., concurring), affirmed *per curiam*, 351 F. 2d 308 (C.A. 1); *Commissioner* v. *Anderson*, 371 F. 2d 59 (C.A. 6); certiorari denied, 387 U.S. 906. As the First Circuit observed in *Wilson* v. *United States*, 412 F. 2d 694, 697, in holding that such payments were neither meals in kind nor furnished on the employer's business premises, "[t]hus we have a case where history, sense and language all coincide." Accord: *Koerner* v. *United States*, 550 F. 2d 1362 (C.A. 4), petition for a writ of certiorari pending, No. 76–1539.

ARGUMENT

I

AN EMPLOYER'S CASH PAYMENTS TO HIS EMPLOYEES TO DEFRAY THE COST OF THEIR PERSONAL EXPENSES FOR MEALS ARE INCLUDABLE IN THE EMPLOYEES' GROSS INCOME UNDER SECTION 61(a) OF THE INTERNAL REVENUE CODE

A. THE LANGUAGE OF SECTION 61(a) AND THE DECISIONS OF THIS COURT ESTABLISH THAT GROSS INCOME INCLUDES ALL RECEIPTS FROM WHATEVER SOURCE UNLESS SPECIFICALLY EXEMPTED BY STATUTE

This federal income tax case involves the scope of the fundamental statutory concept of gross income. Section 61(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 1A) provides that "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, and similar items * * *." As this Court has repeatedly observed with respect to its comparable statutory predecessors, this language was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U.S. 331, 334; *Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U.S. 216, 223; *Douglas* v. *Willcuts*, 296 U.S. 1, 9; *Irwin* v. *Gavit*, 268 U.S. 161, 166.

Thus, for example, in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, the Court ruled that money received as exemplary damages for fraud or as the

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punitive two-thirds portion of a treble-damage antitrust recovery must be included in the recipient's "gross income." In so holding, the Court relied upon the presence in the statute of the broad catch-all phrase "from whatever source derived" as proof that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature" (348 U.S. at 429–430). Given the broad phraseology of the statute, which dates from the very beginnings of the modern income tax (see Section II(B), Revenue Act of 1913, 38 Stat. 114, 167), the Court has consistently recognized that it was "the intention of Congress to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co., supra,* 348 U.S. at 430. See also *Commissioner* v. *LoBue,* 351 U.S. 243, 246; *Commissioner* v. *Jacobson,* 336 U.S. 28, 49; *Helvering* v. *Stockholms Enskilda Bank,* 293 U.S. 84, 87–91.

The foregoing principles apply with equal force to this case. Here, the State of New Jersey makes cash payments of $1,740 per year to its police troopers that are in addition to their salary and designated as meal allowances. The State places no restrictions on the use of the cash meal allowances provided to the troopers. They are not even required to use the allowances for meals. A trooper may eat at home if he lives within his assigned duty area, eat in a public restaurant, or bring his own meal and eat in his patrol car. The amount of the meal allowance is not calculated to reimburse a trooper for any specific number of meals (Pet. App. A 5A).

The unrestricted cash payments to the state police troopers by their employer fall within the broad reach of the statutory definition of "gross income." In the words of this Court, the payments were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra,* 348 U.S. at 431.

In holding that the cash payments to respondent to defray the cost of his personal meal expenses were not includable in his gross income, the court of appeals adhered to its prior decision in *Saunders* v. *Commissioner,* 215 F. 2d 768, involving the same cash meal allowance to the New Jersey police troopers under the 1939 Code. But as the Tax Court majority correctly recognized (Pet. App. A 10A–11A), *Saunders* was decided prior to this Court's holdings in *Glenshaw Glass Co.* and *LoBue* and cannot stand in the light of this Court's broad construction of gross income as all receipts except those specifically exempted. Indeed, the prefatory language of Section 61 (a)—"Except as otherwise provided in this subtitle"—confirms that Congress intended that all items of income be included within the statutory definition of gross income unless they fit within one of the "items specifically excluded from gross income" set forth in Part III of Subtitle A of the Code (Sections 101–124).

Moreover, even apart from this Court's rulings with respect to the definition of "gross income," *Saunders* rests upon an erroneous extension of the pre-1954 Code "convenience-of-the-employer" rule to

cash payments (see *infra,* pp. 14–20). However, that rule, was preempted by Section 119 of the 1954 Code, which restricts the tax exclusion to those meals furnished in kind on the business premises of the employer. Thus, if, as we submit, the cash payments for meals to be consumed off the business premises of respondent's employer do not qualify for exclusion under Section 119 (see Point II, *infra,* pp. 34–43), they must be includable in respondent's gross income.

B. THERE IS NO NON-STATUTORY EXCLUSION FROM GROSS INCOME FOR AN EMPLOYER'S CASH PAYMENTS TO HIS EMPLOYEES FOR THEIR PERSONAL MEALS

1. The Saunders decision erred in extending the "convenience-of-the-employer" rule to cash payments for meals

a. The sole authority cited by the court of appeals in support of its holding that the State's cash meal payments were not includable in respondent's gross income was its prior decision in *Saunders* v. *Commissioner, supra.* There, the court held that a cash allowance for meals paid by the State to its police troopers could be excluded from their gross income because the payments were made for the "convenience of the employer" within the meaning of then-outstanding Regulations 111, Section 29.22(a)–3 (1939 Code). That Regulation provided in part as follows:

> If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished

> constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. * * *

As the court in *Saunders* recognized, the regulation that set forth the convenience-of-the-employer rule "by its terms refer[red] only to living quarters and meals furnished in kind" (215 F. 2d at 771). Nevertheless, the court departed from the literal terms of the Regulation and held that its "rationale" "should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof" (*ibid.*).

To begin with, the court's implicit assumption that cash payments for meals were excludable from income simply because the meals would have been excludable had they been provided in kind cannot stand in the face of this Court's admonition that "[t]ax consequences follow what has taken place, not what might have taken place." *Central Tablet Mfg. Co.* v. *United States,* 417 U.S. 673, 690; *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134, 148–149, and cases cited therein.

Moreover, the policy underlying the pre-1954 Code convenience-of-the-employer rule would not have been served by treating cash payments to defray the cost of meals as equivalent to meals provided in kind. The terms of the Regulation make it clear that the policy of the rule was to permit an employee to exclude the

value of meals furnished to him in prescribed locations by his employer where the purpose of the employer was to enable the employee to perform his duties more efficiently. But extending the exclusion to an employer's unrestricted cash payments to defray the cost of his employees' personal expenses for meals would not have served the "convenience of the employer" any more than any other type of compensation. Such cash payments for personal expenses simply confer upon the employee monetary consideration for services performed that are "undeniable accessions to wealth, clearly realized, and over which the * * * [employee has] complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra,* 348 U.S. at 431.

The court in *Saunders* acknowledged that cash payments to an employer were qualitatively different from meals or lodging in kind. It stated that "[a]dmittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind" (215 F. 2d at 771). However, the court went on to hold that where an employee is furnished cash for a particular purpose, such as for meals, and the entire amount is so expended, then the cash is not taxable compensation.

To be sure, cash payments by an employer to his employee to enable the employee to perform his official duties, such as travel, are not includable in the employee's gross income (see p. 25, *infra*). But there is nothing in the statutory definition of "gross income" that indicates that cash payments by an

employer that are intended to defray the cost of his employee's personal living expenses are not compensation for services. Like wages or commissions, such additional payments are part of the employer-employee relationship and are designed to reward the employee for services performed and to enlist more efficient service from him in the future. As this Court stated in *Commissioner* v. *LoBue, supra,* 351 U.S. at 247, "[w]hen assets are transferred by an employer to an employee to secure better services they are plainly compensation." Accord: *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 720–730.

b. In extending the convenience-of-the-employer rule to cash payments for meals, the court in *Saunders* strongly relied upon *Jones* v. *United States,* 60 Ct. Cl. 552. There, the Court of Claims held that an Army officer's gross income did not include either the value of living quarters or a cash allowance furnished to him in lieu of quarters. But the rationale of the *Jones* decision dealing with the particularized case of the uniformed military services cannot be extrapolated to a non-statutory exclusion for cash allowances for meals to policemen.[9]

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[9] See *Magness* v. *Commissioner,* 247 F. 2d 740 (C.A. 5), certiorari denied, 355 U.S. 931. In refusing to extend the *Jones* decision to state police troopers, the court stated as follows (*id.* at 744): "* * * the Jones case presented the peculiar situation wherein the United States, with one hand, as an employer, gives money to its employees, and with the other hand, as a tax collector, takes it back; whereas a state is in the same position as any other employer so far as the federal income tax obligations of its employees are concerned."

As a result of the *Jones* decision, the then Bureau of Internal Revenue revoked its position that cash subsistence payments to military personnel are includable in gross income (see I.T. 1965, III–1 Cum. Bull. 201) and ruled that such allowances in lieu of subsistence and quarters are not income subject to federal income tax. See I.T. 2219, IV–2 Cum. Bull. 41. See also Mim. 3413, V–1 Cum. Bull. 29. The exclusion for military housing allowances was ultimately incorporated in the Treasury Regulations under the Revenue Acts of 1926, and the 1939 and 1954 Codes. See, *e.g.*, Regulations 69, Article 33; Regulations 77, Article 53; Regulations 111, Section 29.22(a)–3; Treasury Regulations, Section 1.61–2(b) (26 C.F.R.).

But contrary to respondent's argument (Br. in Opp. 10), the Regulations providing tax-free privileges for the uniformed services of the United States do not demonstrate the existence of a generalized non-statutory exclusion for cash meal allowances to civilian taxpayers, such as state police troopers, whose functions might be loosely analogized to the armed services.[10] Indeed, the administrative history makes precisely the same point. For the almost immediate acceptance by the Treasury of the *Jones* decision more than 50 years ago and its continued incorporation

[10] See *Van Rosen* v. *Commissioner*, 17 T.C. 834, where the Tax Court held in a unanimous reviewed decision that the *Jones* rationale was not applicable to a cash subsistence and quarters allowance to a civilian employee of the Army Transportation Corps. See also Rev. Rul. 60–66, 1960–1 Cum. Bull. 21 (cash subsistence and quarters allowance paid by the Department of the Army to a civilian contract surgeon held to be taxable income).

into the Regulations since the Revenue Act of 1926 brings this case within the settled principle that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill,* 305 U.S. 79, 83 (footnote omitted). Accord: *United States* v. *Correll,* 389 U.S. 299, 305–306; *Fribourg Navigation Co.* v. *Commissioner,* 383 U.S. 272, 283.

If any further evidence is required that "Congress traditionally has provided a special system of tax-free allowances for military personnel" (*Commissioner* v. *Stidger,* 386 U.S. 287, 294), it can be found in 37 U.S.C. (Supp. V) 101(25), where Congress explicitly confirmed its prior understanding that "regular military compensation" includes the "Federal tax advantages accruing to the aforementioned [quarters and subsistence] allowances because they are not subject to Federal income tax."[11] There is accordingly no

[11] The exclusion currently applies to subsistence and uniform allowances, and amounts received as commutation of quarters by members of the "Armed Forces, Coast and Geodetic Survey and Public Health Service of the United States." Treasury Regulations, Section 1.61–2(b). While respondent states (Br. in Opp. 10) that it is "significant" that the exclusion extends to the Public Health Service, even though it is not part of the military, the Public Health Service is one of the "uniformed services," as that term is defined by 37 U.S.C. 101(3). Thus, in implementing the *Jones* decision, the Treasury determined to treat all of the "uniformed services" in a consistent manner. Compare O.D. 1098, 5 Cum. Bull. 85, with I.T. 2232, IV–2 Cum. Bull. 144.

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basis to respondent's contention that the tax-free allowances to the military demonstrate the existence of a non-statutory exclusion for an employer's cash payments to defray the cost of his employees' personal expense for meals.[12]

2. The legislative history of Sections 119 and 120 of the 1954 Code establish that the Saunders decision does not survive the enactment of the 1954 Code

The legislative history of Sections 119 and 120 of the 1954 Code confirms the correctness of the Tax

[12] Apart from the military allowances, the only exception to the general principle that an employer's cash payments to defray the cost of his employees' personal and nondeductible expenses for meals are includable in the employees' gross income is O.D. 514, 2 Cum. Bull. 90. There, the then Bureau of Internal Revenue ruled in 1920 that "supper money" paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, is considered to be paid for the convenience of the employer and is not taxable income to the employee.

On its facts, the ruling is readily distinguishable from this case, where respondent received a regular cash allowance for meals for each day he was on active duty, pursuant to a contractual obligation of his employer. Thus, respondent cannot contend that he relied on this "supper money" ruling in support of his claimed exclusion. But quite apart from the factual distinctions between the ruling and this case, O.D. 514 does not reflect the exposition of a technical statutory position that would permit the exclusion of all meal allowances. Instead, the ruling reflects a limited exclusion resulting from the exercise of the Commissioner's administrative discretion in deciding not to require inclusion in income of benefits that are infrequently conferred, difficult to ascertain, and of relatively insignificant value. See, *e.g.*, Rev. Rul. 59–58, 1959–1 Cum. Bull. 17, holding that the value of small items of merchandise purchased by an employer and distributed generally to each of his employees at Christmas or a comparable holiday is not includable in income. See also Pet. App. A 17A–18A, n. 5.

Court's conclusion (Pet. App. A 9A–19A) that the *Saunders* decision did not survive the enactment of the 1954 Code.[13] These provisions independently demonstrate that there is no non-statutory exclusion for cash payments by an employer to defray the cost of personal meals of a civilian employee.

a. Section 119, Appendix, *infra,* pp. 1A–2A, provides an exclusion from an employee's gross income for the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if the meals or lodging are furnished on the business premises of the employer, and the lodging is furnished as a condition of employment. The pertinent Senate Committee Report on this provision observed that "[e]xisting law, as currently interpreted by the Internal Revenue Service and certain court decisions, requires that if meals or lodging represent compensation the value thereof must be included in gross income even though the employee must accept such meals or lodging in order properly to perform his duties." S. Rep. No. 1622, 83d Cong., 2d Sess. 190 (1954). Hence, in order to avoid the necessity of making a factual determination in each case whether meals or lodging were compensation, Congress established an exclusion for "the value of meals or lodging furnished to * * * [an employee] for the convenience of his employer whether or not

[13] Hence, the Tax Court did not consider itself bound to follow *Saunders* as the rule of the circuit to which the case would be appealed. See *Golsen* v. *Commissioner*, 54 T.C. 742, 756–758, affirmed, 445 F. 2d 985 (C.A. 10), certiorari denied, 404 U.S. 940.

such meals or lodging are furnished as compensation. In the case of meals the exclusion is permitted only if the meals are furnished on the business premises of the employer. In the case of lodging the exclusion is permitted only if the employee is required to accept the lodging on the business premises of the employer as a condition of his employment" (*ibid.*).

Plainly, the origin of the statutory exclusion of Section 119 of the 1954 Code is the "convenience-of-the-employer" rule of Regulations 111, Section 29.22 (a)–3 under the 1939 Code. But unlike the earlier version of the exclusion, which turned solely on the generally undefined standard of whether living quarters or meals were furnished for the convenience of the employer, the 1954 Code introduced the requirements that the lodging or meals be provided on the business premises of the employer and that the employee accept the lodging as a condition of his employment. Moreover, in considering whether lodging or meals were furnished for the convenience of the employer, Section 119 provides that "the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative * * *."[14] Finally, and most significantly for present purposes, both the Senate and House Reports state that "Section 119 applies only to meals or lodging furnished in kind." S. Rep. No. 1622, 83d Cong., 2d Sess. 190 (1954). See also H.R. Rep. No. 1337, 83d

[14] Thus, Congress explicitly rejected one of the bases of the *Saunders* decision that was to be rendered one month after the 1954 codification, *viz.*, that the intent and practice of the State authorities was relevant in deciding whether quarters or meals represented compensation (see 215 F. 2d at 774). Contractual labels are not binding in determining the federal tax consequences of a

Cong., 2d Sess. A39 (1954). Accord: Treasury Regulations, Section 1.119–1(c)(2).

The legislative history of Section 119 shows that Congress intended to limit the application of the former "convenience-of-the-employer" rule to meals and lodging furnished in kind. The extension of the rule to cash allowances for meals created by the Third Circuit in *Saunders* therefore did not survive the 1954 Code. Indeed, if the non-statutory exclusion of *Saunders* were still a valid gloss upon the broad statutory definition of gross income, it would not have been necessary for Congress in 1954 to establish detailed rules limiting the exclusion to meals and lodging provided in kind on the business premises of the employer. Thus, under the 1954 Code, cash allowances by an employer to defray the cost of his employees' personal meals of the type at issue here cannot be excluded from gross income on the ground that they are for the "convenience of the employer."

Contrary to respondent's argument (Br. in Opp. 10–13) and that of the Tax Court minority (Pet. App. A 32A–37A), the references to cash allowances in the legislative history of Section 119 do not support the continued validity of the *Saunders* decision

transaction, including an employer-employee relationship. See, *e.g.*, *Bartels* v. *Birmingham*, 332 U.S. 126, 128–129; *Commissioner* v. *Tower*, 327 U.S. 280, 287, 288; *United States* v. *Pelzer*, 312 U.S. 399, 402–403; *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U.S. 110, 114. Indeed, in *Diamond* v. *Sturr*, 221 F. 2d 264 (C.A. 2), the court held that state labels would not control in determining whether food and lodging furnished to employees of the State were includable in gross income under the pre-1954 non-statutory "convenience-of-the-employer" rule. See also *Staunton Industrial Loan Corp.* v. *Commissioner*, 120 F. 2d 930, 933 (C.A. 4).

under the 1954 Code. After noting that Section 119 was to apply only to meals or lodging furnished in kind, the House Committee Report stated: "Therefore, any cash allowances for meals or lodging received by an employee will continue to be includable in gross income, as under existing law, to the extent that such allowances represent compensation." H.R. Rep. No. 1337, *supra,* at A39."

But this statement must be viewed against the background of the case law as it existed at the time of the enactment of the 1954 Code. Apart from the exclusion for cash allowances to the military upheld by the Court of Claims in *Jones,* the decisions had uniformly refused to extend the "convenience-of-the-employer" rule to cash payments for personal meals. See *Van Rosen* v. *Commissioner,* 17 T.C. 834 (*Jones* not applicable to cash allowance to civilian employee of the Army Transportation Corps); *Hyslope* v. *Commissioner,* 21 T.C. 131 (cash meal allowance to state police trooper held to be income); *Saunders* v. *Commissioner,* 21 T.C. 630 (same). Cf. *Benaglia* v. *Commissioner,* 36 B.T.A. 838 (meals and lodging furnished in kind held to be excluded from income). Given the explicit congressional approval of this body of "existing law," there is no basis to respondent's argument (Br. in Opp. 10–11) that Section 119

[13] The statement in the Senate Committee Report is identical except that it omits the phrase "as under existing law." See S. Rep. No. 1622, *supra,* at 190–191.

created a "safe harbor" for meals in kind and that cash allowances could continue to qualify for exclusion under the prior "convenience-of-the-employer" rule.

Moreover, the qualifying statement in the legislative history of Section 119 that cash allowances for meals or lodging will be includable in income "to the extent that * * * [they] represent compensation" does not support respondent's assertion (Br. in Opp. 11) that the "convenience-of-the-employer" rule survived the enactment of the 1954 Code and extends to cash payments for meals. Given the limitation of the Section 119 exclusion to meals and lodging in kind, the quoted statement refers to those instances when an employer makes cash advances to his employee to enable him to obtain meals or lodging in the course of official travel or to incur such expenses solely for the benefit of his employer. While such activities may require the employee to purchase lodging and meals, the payments are not includable in the employee's gross income if he is required to submit an accounting to his employer. See Treasury Regulations, Sections 1.162–17(b), 1.162–17(c), 1.274–5(e).

In those circumstances, the cash allowances do not "represent compensation" to the employee because they are in furtherance of the employer's business. There is accordingly no support in the legislative history of Section 119 for inferring that Con-

gress intended to exclude such payments from the statutory definition of gross income.

b. The legislative history of the short-lived Section 120 of the 1954 Code also shows that there is no post-1954 non-statutory exclusion for cash payments by an employer to defray the cost of personal meals of a civilian employee. Section 120 provided an exclusion up to $5 per day for statutory subsistence allowances received by state and local police officials. In reporting out this provision, the House Ways and Means Committee stated: "There is no comparable exclusion under existing law. Your committee believes that this exclusion is desirable because State police officers are required to make frequent trips away from their posts of duty. Under present law these expenses cannot be deducted if the police officer is to use the standard deduction." H.R. Rep. No. 1337, *supra,* at 18. See also S. Rep. No. 1622, *supra,* at 19–20.

The enactment of Section 120 underscores the error of the court of appeals' adherence to its prior decision in *Saunders* which extended the convenience-of-the-employer rule to cash meal allowances. For if there was a non-statutory exclusion for such cash payments, there would have been no need for Congress to add Section 120 on the ground that "[t]here * * * [was] no comparable exclusion under existing law."

While the Third Circuit in *Saunders* was aware of the legislative history of Section 120, it refused to accord it authoritative weight with respect to the tax

year 1950 on the ground that later statutes may not be used as an aid in the interpretation of earlier acts (see 215 F. 2d at 775). But whatever the merits of this aspect of the *Saunders* decision, it has no application to the post-1954 year involved in this case.[16] The statement of Congress in 1954 that there was no exclusion for cash subsistence allowances for police officials reflects the legislative understanding that such payments were within the statutory definition of gross income.[17]

C. EVEN IF THE NON-STATUTORY "CONVENIENCE-OF-THE-EMPLOYER" RULE SURVIVES THE ENACTMENT OF THE 1954 CODE, THE CASH MEAL ALLOWANCES RECEIVED BY RESPONDENT ARE INCLUDABLE IN HIS GROSS INCOME BECAUSE THEY WERE COMPENSATORY AND NOT PAID FOR THE CONVENIENCE OF THE EMPLOYER

In the foregoing portion of this brief, we have shown that there is no non-statutory exclusion from gross income for an employer's cash payments to defray the cost of his employees' personal meals, and that the Third Circuit in *Saunders* erred in creating such an exclusion. At all events, the non-statutory

[16] The court in *Saunders* also stated that the legislative history of Section 120 "indicates that the proposed exclusion is intended to afford relief to policemen such as Hyslope [21 T.C. 131] whose allowance has been determined to be compensation but it is not necessarily an indication that the allowances of all policemen are compensatory" (215 F. 2d at 775). However, as we pointed out *supra*, p. 25, the only type of noncompensatory cash allowance would be an advance to the employee to incur expenses in furtherance of the employer's business. Thus, payments to defray the cost of an employee's personal meals would always be compensation.

[17] The repeal of Section 120 in 1958 shows that Congress intended to exclude cash allowance from the coverage of Section 119. See Point II, *infra*, pp. 38–39.

"convenience-of-the-employer" rule did not survive the enactment of Section 119 of the 1954 Code, which is now the exclusive provision dealing with meals or lodging furnished for the convenience of the employer. But even if respondent is correct in asserting (Br. in Opp. 11–14) that a non-statutory convenience-of-the-employer rule continues to exist after the 1954 codification and that such a rule excludes from gross income cash meal allowances that are (1) noncompensatory, and (2) paid for the convenience of the employer, the meal payments at issue in this case would not qualify for exclusion because they met neither condition.

1. The payments were compensatory

As this Court held almost 50 years ago in *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 729–730, it is a fundamental principle of our tax law that reimbursement or payment of an employee's non-deductible personal expenses by his employer represents taxable compensation to the employee. Here, there is no suggestion that the meal allowance was a non-taxable gift (see Section 102; *Commissioner* v. *Jacobson*, 336 U.S. 28, 47–52). The unrestricted cash payments to the state police troopers such as respondent were taxable compensation because they were intended to reimburse the troopers for the cost of their personal non-deductible expenses for meals.

As the Tax Court correctly observed, the meal allowance "was obviously compensatory to a trooper to

the extent that it paid for food which he otherwise would have had to pay for from some other source" (Pet. App. A 13A). In this respect, the allowance is on the same footing as a payment for the school tuition of a trooper's children, the rent on his personal residence, his grocery or utility bills, or for his commuting expenses. Since payments for such items confer a personal benefit upon the employee in exchange for the performance of his personal services, they are undisputably part of the employee's compensation. See *United States* v. *Woodall*, 255 F. 2d 370, 372 (C.A. 10), certiorari denied, 358 U.S. 824.

Moreover, the meal allowance paid to respondent had all of the characteristics of compensation. On a police recruitment brochure, the State describes the meal allowance as an item to be received in addition to the base salary. In addition, the meal allowance is included in the compensation base upon which the pension benefits of the state policemen are computed.[18] Surely the State would not pay retirement annuities based upon the meal allowances if they were not compensatory. Cf. *Commissioner* v. *Wolfe*, 361 F. 2d 62, 66 (C.A.D.C.), certiorari denied, 385 U.S. 838. The meal allowance is also a subject of negotiations between the State and the troopers' union (Pet. App.

[18] The retirement allowance is equal to 50 percent of the policeman's "final compensation" plus one percent of his final compensation multiplied by the number of years of service which exceeds 25 years. See N.J. Stat. Ann. 53:5A-8 (1977 Supp.). The term "final compensation" is defined to include the value of the policeman's maintenance allowance. See N.J. Stat. Ann. 53:5A-3i (1977 Supp.).

A 5A). Thus, the payments "represented part of the benefit package which was negotiated as part of the wage structure under the collective bargaining agreement in effect between the * * * [State] and the union representative of the * * * [police troopers]." *Educational Fund of the Electrical Industry* v. *United States,* 426 F. 2d 1053, 1056 (C.A. 2).

Finally, any remaining doubt as to the compensatory nature of the meal allowances is dispelled by the fact that the amount of the allowance was a function of the rank of the recipient. Thus, for example, while respondent and the other police troopers and non-commissioned officers were entitled to an annual allowance of $1,740 for the year at issue, lieutenants and captains received $1,776, majors received $1,848, and the superintendent colonel received $2,136 (A. 24). The direct proportional relationship of the amount of the allowance to rank is inconsistent with the notion that these unrestricted cash payments are noncompensatory substitutions for a standardized on-duty meal in kind.

Respondent will undoubtedly continue to rely (see Br. in Opp. 14) upon the statement in the Tax Court's findings that "[t]he meal allowance was not intended to represent additional compensation" (Pet. App. A 5A). But as the Tax Court correctly recognized in determining whether benefits conferred upon an employee are compensatory, it is the objective circumstances of the arrangement and not the intention

of the employer that are controlling.[19] Thus, the Tax Court later observed in its opinion that "[e]ven though we have found that the meal allowance was not intended as additional compensation, it was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source" (Pet. App. A 12A–13A).

It is this conferring of a personal benefit upon the employee as part of the employer-employee relationship that makes the payment compensatory. The fact that the meal allowance is not paid in exchange for the performance of a particular service does not render it noncompensatory. As the Court stated in *Social Security Board* v. *Nierotko,* 327 U.S. 358, 365–366 (footnote omitted), in referring to the consideration for which compensation is paid, the term "service" means "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer."

Thus, for example, if an employee is required to eat his noon meal in a manner which enables him to return to work within a prescribed period of time, his employer's reimbursement of expenses incurred for that meal is nevertheless part of his taxable compensation. The statutory definition of gross income "is broad enough to include in taxable income any economic or financial benefit conferred on the employee

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[19] As this Court observed in *Commissioner* v. *Duberstein,* 363 U.S. 278, 286, "the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter." See also pp. 22–23, n. 14, *supra.*

as compensation, whatever the form or mode by which it is effected." *Commissioner* v. *Smith,* 324 U.S. 177, 181.

2. The payments were not for the convenience of the employer

In support of his argument that the cash meal allowances were paid for the convenience of the employer, respondent cites (Br. in Opp. 14) the Tax Court's statement that "[the meal allowance] system was adopted to provide the State and the public with better police protection" (Pet. App. A 5A). In so contending, respondent appears to rely upon the State's requirements that if the trooper chooses to eat his meal at a public restaurant, he must do so within his assigned patrol area, that he first check in with the officer in charge and request permission to eat, and that he advise the officer where he may be reached while eating so that he may be subject to call during the eating period (Pet. App. A 5A).

We do not quarrel with respondent's implied assertion that the imposition of these rules is for the convenience of the employer. But the critical question is not whether the restrictions on the troopers' meal periods is for the convenience of the employer but whether the payment of the cash allowances is to be so regarded.

There is no necessary connection between the meal restrictions and the State's decision to make cash payments. Indeed, the majority of working people are subject to similar restrictions as to when and for what length of time they can be absent from their assigned

duty station for the purpose of obtaining a mid-shift meal. In this respect, the troopers' situation is not qualitatively different from that of most other employees. Nevertheless, few employers make cash payments as meal allowances.

Thus, the State's decision to pay the allowances was not compelled by the need to fix the period within which the troopers could take their meals or to limit such activity to their patrol area.[20] The only purpose served by the cash payments was to make the troopers more content with the conditions of their employment by providing them with additional compensation. But for the "meal-allowance" label, the same result could have been achieved by increasing the troopers' annual salary by $1,740. Indeed, as a practical matter that was precisely what the cash meal allowances did.

In sum, even if there is a non-statutory "convenience-of-the-employer" rule that survives the enactment of the 1954 Code, the meal allowances at issue would not qualify for exclusion because they were compensatory and not for the convenience of the employer. Thus, absent the applicability of a specific statutory exclusion, they are fully includable in gross

[20] That the meal allowances were unrelated to the restrictions designed to provide the public with better police protection is further shown by the fact that the payments were made to all police officials regardless of the nature of their duty. For example, respondent continued to receive the allowance during the May 7–June 28, 1970 period when he was engaged in screening prospective recruits (see Pet. App. A 7A). It would seem that the State would have had little interest in controlling the location or time of his meals during this non-patrol assignment.

income within the meaning of Section 61(a). Since the only possibly applicable statutory exclusion is Section 119, we turn now to show why respondent did not meet the conditions of that provision.

II

AN EMPLOYER'S CASH PAYMENTS TO HIS EMPLOYEES TO DEFRAY THE COST OF THEIR PERSONAL EXPENSES FOR MEALS ARE NOT EXCLUDABLE FROM THE EMPLOYEES' GROSS INCOME UNDER SECTION 119 OF THE INTERNAL REVENUE CODE

The court of appeals' holding that the cash payments designated as meal allowances by the State are excludable under Section 119 is likewise erroneous. As we have shown *supra,* pp. 21–23, Section 119 permits the exclusion from an employee's gross income of "the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer * * *." There are three requirements for qualification under this provision: (1) the meals must be furnished for the convenience of the employer; (2) the meals must be furnished in kind; and (3) the meals must be furnished on the business premises of the employer. The meal allowances at issue here do not meet any of those requirements. Since the statute provides that meals or lodging must meet all three requirements in order to be eligible for the exclusion, the failure of the payments at issue to qualify under

any one of the three statutory criteria would render the cash allowances includable in respondent's income.

A. THE CASH PAYMENTS WERE NOT MADE FOR THE CONVENIENCE OF THE EMPLOYER

The first requirement of Section 119—that the meals be furnished for the convenience of the employer—has its origin in the non-statutory rule under the 1939 Code. But as we have established in Point I. C. 2, *supra,* pp. 32–34, the cash payments at issue in this case were not made for the convenience of the employer, because they were entirely unrelated to the restrictions imposed by the State with respect to the time and place of the police troopers' meals.

These restrictions may have enhanced the convenience of the State to provide better police protection. However, the critical fact is that the State could have imposed such restrictions upon the troopers without paying them the cash allowances. The cash allowances were purely compensatory and were not made for the convenience of the employer.

The facts of this case illustrate the correctness of the general proposition that an employer's cash payments to defray the cost of his employee's personal meals can never meet the "convenience-of-the-employer" standard. While meals in kind furnished on the business premises of the employer keep the employees close to their assigned work place and promote greater efficiency and thereby serve the "convenience of the employer," cash meal allowances simply enrich the employee and do not of themselves im-

pose any controls for the benefit of the employer. Here, for example, the troopers presumably would have eaten in the same restaurants at the same times and for periods of the same duration, whether or not they received a cash allowance.

B. SECTION 119 APPLIES ONLY TO ACTUAL MEALS FURNISHED IN KIND AND NOT TO CASH ALLOWANCES

1. In enacting the exclusion in the 1954 Code for employer-provided meals, both the House and Senate Reports stated that "[s]ection 119 applies only to meals or lodging furnished in kind." S. Rep. No. 1622, *supra,* at 190; H.R. Rep. No. 1337, *supra,* at A39; accord: Treasury Regulations, Section 1.119–1(c)(2), Appendix, *infra,* p. 4A. By limiting the exclusion to actual meals furnished in kind, Section 119 insured that cash allowances would not be used as a disguised form of additional compensation.[21] Thus, the statute speaks of "the *value* of any meals * * * *furnished* * * * by his employer" (emphasis added) to implement the congressional intention to limit the exclusion to meals in kind. The statutory exclusion does not encompass cash allowances for meals purchased by the employee from a third party. As the First Circuit succinctly put it in *Wilson* v. *United States, supra,* 412 F. 2d at 696 (footnote omitted): "What

[21] Significantly, the Senate retained the "in kind" requirement in the statute (see Hearings on H.R. 8300 (Internal Revenue Code of 1954) before the Senate Committee on Finance, 83d Cong., 2d Sess. 485 (1954)) even though the American Bar Association Section of Taxation had recommended its deletion (as well as deletion of the "business premises" requirement) in favor of the general

the statute speaks of as furnished is the meals, not the cost; furnishing means supplying, or serving, not paying. Indeed, 'cost' is not even referred to, but 'value,' a word more consistent with appraisal than monetary payment." Accord: *Ghastin* v. *Commissioner,* 60 T.C. 264.

This reading of Section 119 is confirmed by other provisions in the Internal Revenue Code. The Code uses the term "value" to refer to a transfer of property other than money (see, *e.g.,* Sections 351(b)(1), 356(a)(1)(B), 358(a)(2), and 1001(b)). However, when Congress intends to cover both the transfer of cash and of other types of property, it uses language other than "value" to designate cash transfers.

For example, Section 107, which provides for an exclusion for the clergy for the "[r]ental value of parsonages," speaks of "(1) the rental *value* of a home furnished to him as part of his compensation, or (2) the rental *allowance* paid to him as part of his compensation, to the extent used by him to rent or provide a home" (emphasis added).[22] In constrast, the predecessor of Section 107 (Section 22(b)(6) of the 1939 Code) provided an exclusion only for the rental

"convenience-of-the-employer" rule. The Bar Association has urged that the exclusion not be limited to employees whose employers had facilities for providing meals and lodging, such as "restaurant, hospital, hotel, and domestic employees." Congress was therefore fully aware of the limitations of the "in kind" and "business premises" requirements.

[22] See also Section 117, which provides an exclusion for scholarship and fellowships and applies to both "amounts received" and "the value of [contributed] services and accommodations."

value of an actual home furnished to members of the clergy. When Congress extended the exclusion to cash rental allowances in 1954, it explained the statutory change as follows (H.R. Rep. No. 1337, *supra,* at A35):

> The first paragraph of this section is derived from section 22(b)(6) of the 1939 Code. No substantive change is made.
>
> The second paragraph provides that the allowance paid to a minister of the gospel as part of his compensation (to the extent used by him to rent or provide a home) is not a part of his gross income. Thus, a minister who receives a rental allowance in lieu of the use of a home will be able to exclude this allowance if it is used to rent or provide a home.

The congressional intention to exclude cash allowances from the coverage of Section 119 is further demonstrated by the enactment of Section 120 in 1954 and its repeal in 1958. As we have described *supra,* pp. 26–27, that latter provsion permitted police officers to exclude from income cash subsistence allowances not in excess of $5 per day. If Congress believed that cash allowances to police officers were excludable under Section 119, it would not have been necessary to add Section 120 to the Code.

After the enactment of Section 120, the state governments began to designate portions of police salaries as subsistence allowances in order to permit the officers to take advantage of the $5 per day exclusion. See *United States* v. *Shirah,* 253 F. 2d 798 (C.A. 4). In order to eliminate this abuse, Congress repealed Section 120 by Section 3, Technical Amendments Act

of 1958, Pub. L. 85–866, 72 Stat. 1606, and explained (H.R. Rep. No. 775, 85th Cong., 1st Sess. 7 (1957)) that—

> this exclusion is inequitable since there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Thus, it appears that certain police officials by reason of this exclusion are placed in a more favorable position taxwise than other individual income taxpayers who incur the same types of expense. * * *
>
> Therefore, to bring the tax treatment of subsistence allowances for police officials into line with the treatment of such allowances in the case of other taxpayers, your committee's bill repeals section 120 of present law which provides this special allowance. * * *

If, as the decision below holds, cash payments are excludable under Section 119, the repeal of Section 120 would be rendered ineffective and the inequity that Congress believed it had eliminated between police officials and other employees would be perpetuated. The extension of Section 119 to cash allowances would frustrate the clearly stated intention of Congress.

2. The four courts of appeals that have held that cash meal allowances to police troopers are excludable under Section 119 have failed to give effect to the statutory requirement that the meals be furnished in kind. In *United States* v. *Barrett,* 321 F. 2d 911 (C.A. 5), the first appellate decision to consider the question whether Section 119 applied to cash meal allow-

ances, the court did not refer either to the legislative history or the Regulations limiting the exclusion to meals furnished in kind. Instead, it relied upon *Saunders,* despite the fact that the Third Circuit's earlier decision in *Saunders* did not address the applicability of Section 119 because it involved a tax year prior to the enactment of that provision.[23]

In the second appellate decision, *United States* v. *Morelan,* 356 F. 2d 199 (C.A. 8), the court was aware of the statements in the legislative history limiting the exclusion of Section 119 to meals furnished in kind. But the court read the legislative history to mean "that only cash allowances which 'compensate'—i.e., reward or benefit rather than reimburse—are includable in gross income" (356 F. 2d at 204).

As we explained *supra,* pp. 23–26, the committee reports confirm that in enacting Section 119, Congress did not intend to alter the law with respect to cash allowances so that such payments for meals received by an employee would continue to be includable in gross income to the extent that they represented compensation. But that is a far cry from the Eighth Circuit's conclusion that Section 119 excludes noncompensatory cash payments for meals from gross income. What the committee reports stated is that *no* cash payments—either compensatory or noncompensatory—were to be covered by Section 119, but that

[23] The Fifth Circuit recently reaffirmed its *Barrett* decision in *Smith* v. *United States*, 543 F. 2d 1155, petition for a writ of certiorari pending, No. 76-1243.

noncompensatory payments would be excludable under the prior law.

At all events, an employer's cash payments to defray the cost of his employees' personal meal expenses are inherently compensatory (see pp. 28–32, *supra*).[24] There is accordingly no basis for the Eighth Circuit's exclusion of such payments under Section 119 or otherwise.[25]

C. THE TROOPERS' MEALS WERE NOT FURNISHED ON THE BUSINESS PREMISES OF THE EMPLOYER

The third requirement for qualification for exclusion under Section 119 is that the meals must be "furnished on the business premises of the employer." Thus, even if the cash allowances were the equivalent of meals in kind, they are not excludable from respondent's gross income because the public eating places at which he consumed his mid-shift meals were not the business premises of the employer.

In defining the statutory phrase "business premises of the employer," Treasury Regulations, Section 1.119–1(c)(1) provides that the term generally means the place of the employment of the employee. Thus,

[24] While the Eighth Circuit in *Morelan* characterized the record in that case as establishing that the cash meal allowances were noncompensatory (see 356 F. 2d at 204), it did not specify either the evidentiary basis or the legal standard for that aspect of its decision.

[25] Like the decision below, the Tenth Circuit in *United States* v. *Keeton*, 383 F. 2d 429, did not attempt any independent analysis of the statutory requirement that the meals be furnished in kind. Instead, it simply expressed agreement with *Barrett* and *Morelan* (see 383 F. 2d at 430).

meals furnished in the home where a domestic servant performed his duties or on the grazing lands where cowhands herded their employer's cattle would be regarded as furnished on the business premises of the employer. But public eating places or an employee's own home are, under no stretch of the imagination, the business premises of the employer.

"The term 'business premises' is one of 'great specificity'" (*Wilson* v. *United States, supra,* 412 F. 2d at 696) and cannot be loosely construed as any place where an employee might conveniently eat his lunch. As Judge Raum observed in *Dole* v. *Commissioner,* 43 T.C. 697, 708, affirmed *per curiam,* 351 F. 2d 308 (C.A. 1), "[t]he statute does not say 'at some convenient or reasonably accessible place * * *.' It says 'on the business premises' of the employer." Since the State did not conduct any business in the public restaurants or the homes in which respondent and his fellow troopers ate their mid-shift meals, these locations were not "the business premises of the employer." Accord: *Koerner* v. *United States, supra.*

Contrary to the *Barrett* and *Morelan* decisions, which the court of appeals cited with approval (Pet. App. B 40A), the business premises of a police trooper cannot be deemed to be the entire state or even the area that he patrols (see 321 F. 2d at 912; 356 F. 2d at 203). This broad formulation would frustrate the efforts of Congress to spell out with particularity the conditions for the exclusion of employer-provided meals. Such a broad area is no more the business premises of a police trooper's employer than the assigned "territory" of a traveling salesman would be the business premises of the salesman's employer. In both instances, the term "business premises" must be construed to effectuate the purpose of Congress to limit the exclusion to cases where the employee consumes his meal at his assigned duty station so as to serve the convenience of the employer, and not at any location within a wide geographical area. As the Sixth Circuit stated in *Commissioner* v. *Anderson,* 371 F. 2d 59, 67, certiorari denied, 387 U.S. 906:

> When Congress drew this line so as to require that the meals be furnished or the lodging be provided "*on* the business premises of the employer," it is not the proper function of a court to disregard that line and substitute a line of its own choosing. [Emphasis in original.]

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1977.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

* * * * *

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.119-1 *Meals and lodging furnished for the convenience of the employer.*

(a) *Meals*—(1) *In general.* The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) *Meals furnished without a charge.* (i) Meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for

a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. * * *

(ii) (*a*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

* * * * *

(*c*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (*c*) when there are insufficient eating facilities in the vicinity of the employer's premises.

* * * * *

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

* * * * *

(c) *Rules.* (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

(d) *Examples.* The provisions of section 119 may be illustrated by the following examples:

* * * * *

Example (5). A Civil Service employee of a State is employed at an institution and is required by his employer to be available for duty at all times. The employer furnishes the employee with meals and lodging at the institution without charge. Under the applicable State statute, his meals and lodging are regarded as part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from his gross income.

* * * * *

Example (8). A manufacturing company provides a cafeteria on its premises at which its employees can purchase their lunch. There is no other eating facility located near the company's premises, but the employee can furnish his own meal by bringing his lunch. The amount of compensation which any employee is required to include in gross income is not reduced by the amount charged for the meals, and the meals are not considered to be furnished for the convenience of the employer.

Example (9). A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals.

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IN THE

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OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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COMMISSIONER OF INTERNAL REVENUE,
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ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

Sections 61 and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and the relevant portions of Treasury Regulations, Sections 1.61-2 and 1.119-1 (26 C.F.R.) are set forth in the Appendix hereto, pp. 1A-7A.

QUESTION PRESENTED

Whether a noncompensatory cash meal allowance paid to a state police trooper for the convenience of his employer is includible in his gross income under the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

In 1970, the year in issue, respondent[1] was a trooper with the Division of State Police of the Department of Law and Public Safety of the State of New Jersey (hereinafter "State Police"). He originally enlisted in the State Police in August 1960 and reenlisted in 1962 and 1964. During his second term he received tenure, and at all times after his original enlistment he was a trooper in good standing with the State Police. (Pet. App. A, pp. 2A-3A.)

The State Police, created by act of the New Jersey legislature on March 29, 1921, is responsible statewide for all police functions and has primary responsibility in those areas of the state not within the jurisdiction of local authority. It also assists local police departments. (Pet. App. A, p. 3A.)

The executive and administrative head of the State Police is the Superintendent of State Police (hereinafter "Superintendent"). He is appointed by the Governor of the State of New Jersey. The Superintendent, with the approval of the Governor, makes all rules and regulations for the operation, control and discipline of the State Police, which is organized along military lines. The Superintendent is authorized to provide for the commutation of rations (hereinafter "meal allowance") and quarters to those members of the State Police not provided with rations and quarters by the State. (Pet. App. A, p. 3A.)

Below the Superintendent, who holds the rank of colonel, is the Deputy Superintendent who has the statutory rank of major. The remainder of the State Police is comprised of men with the statutory ranks of captain, lieutenant, sergeant, and trooper. In 1970 there were approximately 1,500 people in the State Police, of whom approximately 900 were troopers. (Pet. App. A, p. 3A.)

1. References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year in issue.

Prior to July 1949, all troopers were supplied with meals at meal stations located throughout New Jersey at the expense of the State. In those instances where a trooper was unable to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the State. Despite various efforts at enforcing the meal station system, it proved unsatisfactory. Each trooper would have to leave his patrol area unguarded for approximately an hour and a half to enable him to travel to his meal station, to eat his meal and to return to his post. Efforts aimed at staggering eating periods proved unworkable and drew complaints from those in charge of the meal stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the State discontinued its meal station operations and, instead, instituted a meal allowance system. (Pet. App. A, pp. 3A-4A.)

This system provided for a daily meal allowance for all members of the State Police while they were on active duty. In 1970 the annual meal allowance rate for troopers was $1,704[2] and this amount was paid without adjustment except for leave for military training. All troopers were entitled to the same meal allowance regardless of years in service or the actual amount of time spent on active duty, but their salaries increase with their length of service. (Pet. App. A, pp. 4A-5A.)

Meal allowances and troopers' salaries are separately accounted for in the State Police's accounting system. Funds are never commingled between the salary account and the meal allowance account. The meal allowance is paid biweekly in advance and the salaries are paid biweekly in arrears. These amounts are separately stated on the troopers' biweekly checks. (Pet. App. A, p. 4A.)

2. Although respondent was entitled to $1,704 in meal allowance money, he received only $1,697.54. This slight difference is not relevant. (Pet. App. A, p. 4A, n.2.)

The meal allowance system was adopted to provide the State and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation. (Pet. App. A, p. 5A.)

Under the meal allowance system the troopers are expected to eat at a public eating place within their assigned patrol area. Before eating, a trooper must first check in with the officer in charge of his station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating. A trooper is subject to call during the eating period. Such calls are not an uncommon experience. Troopers are not permitted to accept free meals. (Pet. App. A, p. 5A.)

Respondent was required to keep a record of his activity for each 24-hour period. Based on these records respondent spent 200 nights away from home on active duty. Respondent spent the entire amount of his meal allowance for meals while on active duty. (Pet. App. A, p. 7A). No restrictions are placed on a trooper's use of his meal allowance. A trooper may eat at home if it is within his assigned patrol area and if he receives permission to do so, or he may bring his own meal and eat in or near his patrol car. The meal allowance is not calculated to provide reimbursement for any specific number of meals, nor is a trooper required to account to the State for his meal expenses. (Pet. App. A, p. 5A.)

State Police recruits are told that, in addition to their salary, a meal allowance will be paid to them in cash, which is in lieu of the State's furnishing meals they are required to eat while they are on active duty. The meal allowance is also a subject of negotiations between the State and the troopers' union. (Pet. App. A, p. 5A.)

A trooper is on active duty when he is in uniform performing his official duties. A trooper, however, is on call 24 hours a day and his actual active duty time is determined by the manpower needs of the station to which he is assigned. It is the policy of the State Police to give every man a broad scope of experience by giving him various assignments as operations permit, and during 1970 respondent had several different assignments. (Pet. App. A, p. 6A.)

Respondent reported $9,066 in wages and salaries on his 1970 federal income tax return. This amount included his base salary of $8,739.38 and meal allowance of $326.45[3]. He did not include the remaining $1,371.09 of meal allowance in the tax return. Respondent claimed as a miscellaneous itemized deduction $405 of food maintenance expenses.[4] Petitioner disallowed this deduction, determining that the meal allowance funds were includible as gross income under Section 61 of the Code, and calculated a deficiency of $69.54. (Pet. App. A, pp. 7A-8A.)

Subsequently, after respondent had filed his petition in the Tax Court and after petitioner had answered, petitioner discovered that the remaining $1,371.09 of meal allowance funds received by respondent in 1970 was not included in respondent's tax return. Petitioner filed an Amendment to Answer of respondent's Petition in the United States Tax

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3. Prior to October 1, 1970, federal income tax was not deducted and withheld from the meal allowance paid to the troopers based on *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), reversing 21 T.C. 630 (1954). In October 1970 the State began to deduct and withhold the appropriate amounts after correspondence and discussions with the Commissioner of Internal Revenue. Consequently, only $326.45 of respondent's meal allowance was included on his Wage and Tax Statement (Form W-2) for the year 1970. (Pet. App. A, p. 7A, n.3.)

4. Although there is a minor difference between the meal allowance included as salaries and wages in the tax return as income and the amount of the deduction taken by respondent, petitioner does not dispute the correctness of the amount claimed as a deduction. (Pet. App. A, p. 8A, n.4.)

Court, to the filing of which respondent did not object, determining that this amount should also be included in gross income. Petitioner accordingly increased the deficiency to $330.70, all of which came into dispute. (Pet. App. A, p. 8A.)

The United States Tax Court held that the meal allowance was includible in income under Section 61 of the Code and was not excludable from income under Section 119 of the Code, but that respondent was entitled to deduct part of the allowance as an expense under Section 162 of the Code. (Pet. App. A, pp. 8A-26A.) The opinion was reviewed by the full Tax Court, and seven judges dissented, including the trial judge, Judge Sterrett, who wrote the principal dissenting opinion. (Pet. App. A, pp. 32A-37A.)

Judge Sterrett (joined by five other judges) dissented on the ground that the meal allowance did not constitute gross income under Section 61 of the Code because, under the long-standing judicial and administrative "convenience of the employer" doctrine, respondent had shown "that it was not compensatory, was required to be received primarily for the benefit of his employer so that he could properly perform his duties, and additionally that it was spent for the purpose paid." (Pet. App. A, p. 37A.)

The United States Court of Appeals for the Third Circuit reversed *per curiam* on the basis of its prior decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), and on the basis of Judge Sterrett's dissenting opinion in the Tax Court. (Pet. App. B, pp. 38A-41A.) Judge Sterrett's opinion did not reach the issues raised under Sections 119 and 162 of the Code.[5]

5. Thus, the questions raised in the Tax Court under Section 119 were not fully considered by the court of appeals, and the questions raised under Section 162 (as to which the respondent, but not the petitioner, appealed) were not considered at all by the court of appeals.

SUMMARY OF ARGUMENT

This case presents the question of the proper federal income tax treatment to respondent, a New Jersey State Police trooper, of a noncompensatory meal allowance, in commutation of rations, provided by the New Jersey State Police for its own convenience.

The New Jersey State Police, respondent's employer, required him to be on duty as a trooper 24 hours a day, 365 days a year. His active duty consisted of long, irregular hours. In 1970, the year in issue, he spent approximately 200 nights at police barracks or in field assignments, and he was on call at all other times.

For many years, the State of New Jersey served meals to its troopers at designated meal stations maintained by the State. This system resulted in inadequate police coverage of the State during mealtimes. Therefore, the State, in 1949, for its own convenience, replaced the meal stations with a noncompensatory meal allowance, so that New Jersey could have full police coverage at all times and at the same time eliminate the expense of maintaining meal stations. The State has always accounted separately for the meal allowance.

The respondent spent at least the total amount of his meal allowance for meals while on active duty.

The respondent's meal allowance does not constitute gross income under the long established convenience of the employer doctrine embodied in Section 61 of the Internal Revenue Code because it was not compensation for services, but rather a subsistence allowance provided for the employer's convenience in lieu of rations required during active police duty. The tax law has long recognized an exclusion from gross income for meals and meal allowances if they are both *noncompensatory* and *provided for the convenience of the employer*. The legislative history of the

Internal Revenue Code of 1954 and the Treasury Regulations promulgated thereunder recognize the validity of this exclusionary doctrine, which is the only basis on which the subsistence and quarters allowances paid to hundreds of thousands of personnel in the armed forces are excluded from their gross income. It is immaterial whether payment is in cash or kind and it is immaterial that incidental personal needs of the employee may also be satisfied. The respondent's meal allowance falls squarely within the scope of this exclusionary doctrine, as the court of appeals held, following its own decision under the Internal Revenue Code of 1939 in *Saunders* v. *Commissioner*, 215 F.2d 768 (3d Cir. 1954). The exclusionary doctrine has not been eroded by the enactment in 1954 of Section 119 of the Code, which provides a specific exclusion from gross income for the value of meals and lodging furnished for the convenience of the employer on the employer's business premises *even if* the meals and lodging are compensatory. Nor has any decision of this Court cast doubt on the validity of the doctrine.

Although the court of appeals reached its decision that the meal allowance did not constitute gross income by analysis of Section 61, the petitioner raises the further argument that the meal allowance is not specifically excluded from gross income under the provisions of Section 119. In response to this argument, it is the respondent's alternative position that the meal allowance in this case meets all the requirements of that Section since: (i) the allowance, having been spent entirely on meals, constituted the value of meals in commutation of rations; (ii) the allowance was furnished by respondent's employer; (iii) the allowance was furnished for the convenience of the employer because the State provided better police protection at less expense than under the former system of meal stations; and (iv) the respondent received his meals on the business premises of the employer because the jurisdiction of the State Police is statewide.

ARGUMENT

I.

THE MEAL ALLOWANCE PAID TO A NEW JERSEY STATE POLICE TROOPER BY HIS EMPLOYER DOES NOT CONSTITUTE GROSS INCOME BECAUSE IT IS BOTH NONCOMPENSATORY AND PAID FOR THE CONVENIENCE OF THE EMPLOYER.

This case presents a question of statutory construction with respect to the meaning and content of the term "gross income" in the context of the Internal Revenue Code of 1954. The computation of gross income is the first step in the computation of taxable income upon which the federal income tax is imposed. Thus, the inquiry is as to the intent of Congress to include the respondent's meal allowance as an item of gross income.

The first guide to the Congressional intent is what Congress enacted: the statute itself. Initially, the content looks broad, for in Section 61 of the Code (App. p. 1A) "gross income" is defined as "all income from whatever source derived, including (but not limited to) . . . (1) Compensation for services, including fees, commissions, and similar items. . . ." The statute therefore limits "gross income" to items of "income", thereby recognizing that a taxpayer may have items of gross receipts that are not items of income. Congress has long been aware that some gross receipts might not constitute "income", for there is a whole grouping of provisions (Sections 71 through 84) entitled "Items specifically included in gross income," relating to matters such as alimony (Section 71), prizes and awards (Section 74) and reimbursements of moving expenses (Section 82). These provisions would be surplusage under the petitioner's view (Pet. Br. p. 13) that Congress intended Section 61 to tax all receipts except those specifically exempted. Moreover, under the petitioner's view, gross income derived from business would be the same as gross receipts, contrary

to the long-established principle, now embodied in Treas. Reg. Section 1.61-3, that in a business context ". . . 'gross income' means the total sales, less the cost of goods sold. . . ." Thus, it is apparent that "gross income" is not a concept susceptible of simple definition.

The Treasury Department itself has recently acknowledged the complex nature of the Internal Revenue Code's definition of gross income in a Treasury Department document entitled "Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits," 1976 CCH Stand. Fed. Tax Rep. ¶8907, P-H 1976 Fed. Taxes ¶65,667, (Office of the Assistant Secretary for Tax Policy, September 2, 1975), which states:

> "With the definition of 'income'—as in the case of other broad concepts such as 'due process' or 'equal protection'—most of the law must be discovered in a study of the ways in which the language has been interpreted." 1976 CCH Stand. Fed. Tax Rep. ¶8907, at p. 77,371.

Accordingly, in order to discover whether Congress intended the respondent's meal allowance to be characterized as an item of "income" to be included within the definition of "gross income," it is necessary to examine the ways in which this language has been interpreted—legislatively, judicially and administratively.

A. Under the long established convenience of the employer rule, the gross income of an employee does not include a subsistence allowance paid to him by his employer if (i) the allowance is non-compensatory and (ii) the allowance is paid for the convenience of the employer.

It has long been established that the gross income of an employee does not include everything of value received by the employee from his employer, since not everything constitutes compensation for services. Congress has recog-

nized this principle in Sections 101, 105, 106, 107, 112, 113, 117 and 119 of the Code. Such specific exclusions are not exhaustive. See *Rudolph* v. *United States*, 370 U.S. 269, at 274 (1962).

The courts have also long agreed that not everything of value received by an employee from his employer represents income. See *e.g.*, *Jones* v. *United States*, 60 Ct. Cl. 552 (1925) (quarters allowance for Army officer); *Bercaw* v. *Commissioner*, 165 F.2d 521 (4th Cir. 1948) (quarters allowance for Army officer); *Saunders* v. *Commissioner*, 215 F.2d 768 (3d Cir. 1954) (meal allowance for state police); *Diamond* v. *Sturr*, 221 F.2d 264 (2d Cir. 1955) (food and lodging to employee while on duty at mental institution); *United States* v. *Barrett*, 321 F.2d 911 (5th Cir. 1963) (meal allowance for state trooper); *United States* v. *Gotcher*, 401 F.2d 118 (5th Cir. 1968) (expense paid trip to Germany); *Benaglia* v. *Commissioner*, 36 B.T.A. 838 (1937), *appeal dismissed*, 97 F.2d 996 (9th Cir. 1938), (meal and lodging for hotel manager); *Cavanagh* v. *Commissioner* 36 T.C. 300 (1961) (reimbursement for food and lodging incurred because of move). All of the cited cases reach their conclusion—that the item of value was not income to the recipient—by analysis of Section 61 or its predecessor, Section 22(a) of the Internal Revenue Code of 1939, and *not* by reliance on any specific exclusionary provision of the Code.

Even the petitioner himself has long agreed to this principle in his rulings and regulations. In fact, it was the petitioner who first established the principle, and it was established in the very same context as the present case —meals. It has been long established that gross income does not include the value of meals or lodging provided to an employee by his employer if the meals or lodging are provided *for the convenience of the employer and not as additional compensation to the employee.*

The origin of this convenience of the employer rule dates back to the early years of the income tax. In 1919, the

Bureau of Internal Revenue ruled that the board and lodging of seamen were furnished for the convenience of the employer and, therefore, were not includible in the gross income of the seamen. O.D. 265, 1 Cum. Bull. 71 (1919). In 1920, the Bureau extended the convenience of the employer rule in O.D. 514, 2 Cum. Bull. 90 (1920):

> "'Supper money' paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to the salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee."

The quoted ruling established early and clearly that it is immaterial whether the value of a meal is provided in cash or in kind, as long as the meal is not compensatory and is provided for the convenience of the employer. It should be noted that O.D. 514, *supra,* which has been in full effect for more than half a century, does *not* require that the employee actually spend the supper money for supper.

The convenience of the employer rule was first embodied in the income tax regulations in 1920. T.D. 2992, 2 Cum. Bull. 76 (1920). The rule was developed administratively over the years prior to the enactment of the Internal Revenue Code of 1954 in a number of rulings and regulations. See the discussions in *Saunders* v. *Commissioner, supra,* and in Gutkin and Beck, *"Some Problems in 'Convenience of the Employer'"*, 36 Taxes 153 (1958). See also Jordan, *"Can cash payments to employees be excluded as meals under Section 119?,"* 45 J. Tax. 310 (1976).

The first judicial recognition of the convenience of the employer rule occurred in *Jones* v. *United States, supra.* In that case, an Army officer, who had been required to live in government quarters for the first part of his taxable year, was transferred for the latter part of the taxable

year to a new post where government quarters were not available. For the latter part of the year, the government paid him a cash allowance in commutation of the quarters. The court held that neither the value of the government quarters nor the cash allowance in commutation of quarters constituted income, since neither was intended as or paid as additional compensation and since the occupancy of government quarters by the officer was a requisite to the proper performance of his duties.

The rationale of the *Jones* decision was incorporated and expanded in the income tax regulations. It is now included in Treas. Reg. Section 1.61-2(b), which provides in relevant part as follows:

> *"Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service.* Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income."

It is significant that this Regulation is promulgated under Section 61, which defines gross income. *There is no specific statutory exclusion for amounts received by military personnel as commutation of rations and quarters.* Thus it is clear that cash allowances may qualify for exclusion from gross income. It is also significant that the Regulation extends to the Public Health Service, even though it is a part of the Department of Health, Education and Welfare rather than part of the military.[6] See 42 U.S.C.

6. Moreover, the Regulation extends to the Coast and Geodetic Survey, even though it is not one of the "uniformed services" as that term is defined by 37 U.S.C. Section 101(3).

Section 202. Furthermore, the rule of the quoted Regulation has been extended by a ruling to the National Guard (Rev. Rul. 60-65, 1960-1 Cum. Bull. 21), even though the National Guard, like the State Police, is an arm of the state. See 32 U.S.C. Section 101(3), (4) and (6).

By 1950, the convenience of the employer rule had evolved so as to be applied administratively:

> "... only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered." Mim. 6472, 1950-1 Cum. Bull. 15.

Thus, on the eve of the consideration and enactment of the Internal Revenue Code of 1954, it was the position of the Bureau of Internal Revenue that the convenience of the employer rule was not to be applied in situations where the employee's receipt of benefits was compensatory. In this context, Congress enacted the present Section 119 (App. p. 2A) as part of the Internal Revenue Code of 1954. Section 119 excludes from an employee's gross income the value of meals provided to him by his employer for the convenience of the employer on the business premises, whether or not compensatory.

While Section 119 was the first specific legislative inclusion of the convenience of the employer doctrine, it was not intended to preempt the field. The purpose of Section 119 was to carve out a safe harbor where the value of meals and lodging furnished for the convenience of the employer would be excluded from the gross income of the employee for income tax purposes *even if* the meals and lodging were compensatory. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. 18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 19 (1954). The Senate Finance Commitee Report stated:

> "Under section 119 as amended by your commitee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation."
>
> "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income *to the extent that* such allowances constitute compensation." S. Rep. No. 1622, 83d Cong., 2d Sess. 190-191 (1954). (Emphasis added.)

See also Rev. Rul. 59-307, 1959-2 Cum. Bull. 48, following *Boykin* v. *Commissioner*, 260 F.2d 249 (8th Cir. 1958).

From the foregoing it is clear that Section 119 was not intended to displace what has been described as the "common law 'convenience of the employer' test." 1 Surrey *et al., Federal Income Taxation*, 130 (1972). The regulations under Section 119 also recognize the non-exclusivity of that section. Treasury Regulation Section 1.119-1(c)(2) provides in relevant part as follows:

> "The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. . . . Cash allowances for meals or lodging received by an employee are includible in gross income *to the extent that* such allowances constitute compensation." (Emphasis added.)

Thus, under both the Senate Finance Committee Report and the Treasury Regulations, meal allowances paid in cash for the convenience of the employer are includible in gross income *only if* they are compensatory. See Rev. Rul. 60-65, *supra*, for another administrative recognition of the continued vitality of the convenience of the employer doctrine of exclusion from gross income.

The petitioner's inference (Pet. Br. p. 26) from the enactment in 1954 and repeal in 1958 of former Section 120 illustrates his failure to understand the convenience of the employer rule. Section 120 allowed police officers to exclude from gross income up to $5 per day received as a statutory subsistence allowance, whether or not the allowance was paid for the convenience of the employer. Since there was no requirement (i) that this allowance be noncompensatory or (ii) that it be paid for the convenience of the employer, Section 120 was wholly outside the realm of the convenience of the employer doctrine. The enactment and repeal of Section 120, therefore, were irrelevant to the doctrine.

More recently, the Treasury Department has reaffirmed the common law nature of the Code's definition of gross income by stating in "Fringe Benefits; Notice of Publication of Discussion Draft of Regulations [under Code Section 61]," 40 Fed. Reg. 41118 (September 5, 1975):

> "The Internal Revenue Code does not provide special rules for determining which economic benefits provided to employees by their employers are required to be included in gross income."

This common law approach is reinforced in the Treasury's "Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits," *supra,* which states:

> ". . . [O]fficial interpretations outstanding for decades hold that such things as travel passes for railroad employees or supper money for employees who work overtime are not to be included in income." 1976 CCH Stand. Fed. Tax Rep. ¶8907, at p. 77,371.
>
> "The Internal Revenue Code as presently interpreted by the regulations and the better reasoned case law requires more than a finding that an employee enjoyed an economic benefit. Section 61(a)(1) of the Code speaks of 'compensation *for* services'," Id. at p. 77,375. (Emphasis in the original.)

> "The statutory definition of income is very broad. That broad scope provides the residual authority to deal with new forms of compensation and other income generally as they develop without having to amend the statute each time. Inherent in that authority is the flexibility and, indeed, the necessity to distinguish between economic benefits which should be taxed and those which should not." Id.
>
> "[M]any high-income persons, particularly those whose business and personal lives are in effect melded, enjoy major economic benefits in the form of meals, lodging, travel and entertainment, much of which goes untaxed under rules that are statutory. When this is occurring in so widespread a fashion, it seems particularly unfair, for example, to tax ordinary airline employees for traveling in otherwise empty seats or to tax retail clerks for discounts received on goods purchased from their employer." Id.

Or, it may be added, *a fortiori,* it seems grossly unfair to tax low-income persons like ordinary state troopers for a meal allowance required for their meals while on active duty, when *their* business and personal lives are in effect melded and when the meal allowance system is for the benefit of the State as the employer, rather than the employee.

The common law approach is further reinforced by the announcement of withdrawal of the Discussion Draft. The Internal Revenue Service Notice of December 20, 1976, 1977 CCH Stand. Fed. Tax Rep. ¶6277, stated that, because of "The problems associated with establishing rules of general applicability with respect to fringe benefits":

> "The question of whether fringe benefits result in taxable compensation to employees should continue to depend, as it presently does, on the facts and circumstances that exist in individual situations."

Except for the present case, the application of the convenience of the employer doctrine to state troopers has not been considered by any court for years to which the Internal Revenue Code of 1954 applies, except within the context of Section 119. See *Koerner* v. *United States,* 550 F. 2d 1362 (4th Cir. 1977), *rev'g* 404 F. Supp. 1128 (S.D. W. Va. 1975), *petition for cert. filed,* 45 U.S.L.W. 3754 (May 5, 1977) (No. 76-1539); *Smith* v. *United States,* 543 F. 2d 1155 (5th Cir. 1976), *aff'g* 75-1 U.S. Tax Cas. ¶ 9184, 35 Am. Fed. Tax R. 2d 75-345, (N.D. Miss., Delta Div., No. DC 73-113-K, Nov. 19, 1974), *petition for cert. filed,* 45 U.S.L.W. 3619 (March 7, 1977) (No. 76-1243); *Ghastin* v. *Commissioner,* 60 T.C. 264 (1973); *United States* v. *Barrett,* 321 F. 2d 911 (5th Cir. 1963), *aff'g Barrett* v. *United States,* 205 F. Supp. 307 (S.D. Miss. 1962); *United States* v. *Morelan,* 356 F. 2d 199 (8th Cir. 1966), *aff'g Morelan* v. *United States,* 237 F. Supp. 879 (D. Minn. 1965); *United States* v. *Keeton,* 383 F. 2d 429 (10th Cir. 1967), *aff'g Keeton* v. *United States,* 256 F. Supp. 576 (D. Col. 1966); and *Wilson* v. *United States,* 412 F. 2d 694 (1st Cir. 1969), *aff'g Wilson* v. *United States,* 292 F. Supp. 200 (D.N.H. 1968). Indeed, other than the present case, the application of the convenience of the employer doctrine under Section 61 of the 1954 Code has been mentioned in only one case, and there without citation or enlightening discussion. *Barrett, supra.* Therefore, since the foregoing discussion makes it abundantly clear that the convenience of the employer doctrine is alive and well under the 1954 Code and that Section 119 does not constitute the exclusive application of the doctrine, the cases decided under the 1939 Code must be considered.

The most exhaustive consideration of the application of the convenience of the employer doctrine to state troopers is found in *Saunders* v. *Commissioner, supra,* decided under Section 22(a) of the Internal Revenue Code of 1939,

the predecessor of Section 61 of the 1954 Code. In *Saunders,* the United States Court of Appeals for the Third Circuit held that the meal allowance paid to a trooper of the New Jersey State Police did not constitute gross income. The Tax Court's opinion in the instant case recognizes that *Saunders* involved "circumstances not substantially different from those involved in the instant case." (Pet. App. A, p. 9A) In order to understand the rationale of the *Saunders* holding, it is necessary to place the case in context by reviewing two prior decisions, *Van Rosen* v. *Commissioner,* 17 T.C. 834 (1951), and *Hyslope* v. *Commissioner,* 21 T.C. 131 (1953).

In *Van Rosen,* the Tax Court held that a cash allowance in lieu of subsistence and quarters constituted gross income to a civilian employee of the Army who was employed ashore as master of a vessel undergoing conversion at a shipyard from a cargo ship to a hospital ship. The court's holding was based on its refusal to apply the authority of *Jones* v. *United States, supra,* to any civilian employee. It should be recalled that Treas. Reg. Section 1.61-2(b) now extends to civilians the scope of its exclusion from gross income.

Hyslope was the first case involving a state trooper. In a one paragraph opinion on this point, the Tax Court, without mentioning the convenience of the employer rule, followed *Van Rosen* in refusing to apply the authority of *Jones* to a civilian employee. Therefore, the Tax Court held that a flat monthly sum paid to a state trooper as reimbursement for expenses constituted gross income. Trooper Hyslope was not required to sleep in police barracks, unlike Trooper Kowalski, the respondent in the present case.

Saunders was decided by the Tax Court three months after its decision in *Hyslope,* which was followed without further meaningful discussion. *Saunders* v. *Commissioner,*

21 T.C. 630 (1954). The Third Circuit, relying, among other authorities, on O.D. 514, *supra*, *Jones* v. *United States*, *supra*, and Mim. 6472, *supra*, reversed the Tax Court on the ground that the meal allowance was paid to the trooper for the convenience of his employer, as evidenced by the fact that the payment of the subsistence allowance and the permission granted to the taxpayer to purchase his meals at a public restaurant helped to improve the quality of the New Jersey State Police by allowing troopers to be on patrol at all times and by saving the costs of furnishing meals in kind. The court repudiated the "artificial distinction between 'military' and 'civilian' personnel" and chose to utilize instead the following statement from *Van Rosen* as the criterion for the application of the convenience of the employer doctrine:

> "In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment." 17 T.C. at 838, quoted in 215 F.2d at 774-775.

Moreover, the court also rejected any artificial distinction between payment in cash and payment in kind:

> ". . . Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation." 215 F.2d at 771.

Implicit in the opinion was the realization that Trooper Saunders was unable to use his cash meal allowance for any purpose other than its intended use—meals while the trooper was on active duty—since the Tax Court had found that Trooper Saunders had spent at least the amount of his meal allowance for meals while on duty. Similarly, in the present case, the Tax Court found as a fact that the respondent "spent his entire amount of meal allowance received for meals while on active duty." (Pet. App. A, p. 7A.)

In summary, the convenience of the employer rule, which has been recognized both judicially and administratively for more than five decades, holds that the gross income of an employee does not include a meal allowance paid to him by his employer if (i) the allowance is noncompensatory, because it is (a) not intended as compensation and (b) not charged to the salary account, and (ii) the allowance is paid for the convenience of the employer. This doctrine has evolved in the course of defining gross income under Section 61 and its predecessors. It is not dependent on any specific statutory exclusion. Section 119, far from limiting the convenience of the employer rule, mitigates this strict doctrine by providing a statutory safe harbor within which the value of meals and lodging may be excluded from gross income *even if* they are compensatory.

B. The State Police's meal allowance to the respondent falls within the convenience of the employer doctrine.

The petitioner appears to agree with the respondent's position that the convenience of the employer rule imposes

a two-pronged test: (i) the allowance must not be compensatory; and (ii) the allowance must be paid for the convenience of the employer. It must be recognized that, although these two prongs have been separately categorized for purposes of analysis, the two concepts are interrelated. In fact, at least one court has held that the first category—compensation—is subsumed within the second category—convenience of the employer. See *Diamond* v. *Sturr*, 221 F.2d 264 (2d Cir. 1955).

1. The meal allowance paid to the respondent by the State of New Jersey as his employer was noncompensatory.

The Tax Court's findings of fact in this case establish without contradiction that the meal allowance was noncompensatory. The Tax Court found as follows:

> "The meal allowance is paid biweekly in advance and is included, although separately stated, with the trooper's salary which is paid in arrears. The meal allowance money is also separately accounted for in the state police's accounting system. Funds are never co-mingled between the salary and meal allowance accounts. All troopers are entitled to the same meal allowance regardless of years in service or the actual amount of time spent on active duty. Their salaries increase with their length of service." Pet. App. A, pp. 4A-5A.)
>
> "The meal allowance was not intended to represent additional compensation." (Pet. App. A, p. 5A.)
>
> "State police recruits are told that the meal allowance will be paid to them in cash and is in lieu of of the furnishing of meals they are required to eat while they are on active duty. (Pet. App. A, p. 5A.)

Compensation is a fluid concept. In "Summary and Explanation of Discussion Draft of Proposed Regulations on

Fringe Benefits," *supra*, the Treasury Department approves the following statement:

> "The line between [compensation and conditions of employment] is, perhaps, not susceptible of precise definition. The reason it is not is because the line is really an institutional and sociological one. It depends very much on what our current conception of the relative responsibilities of employer and employee happen to be. The question is whether the benefit in question is one which we regard as a proper responsibility which employers should supply for employees as a condition of employment wholly apart from the compensation for their work. And the answers to that question vary from time to time.
>
> "To the extent that benefits are usually or normally provided by employers, even though they may involve a saving to an employee over alternative methods of providing this facility by himself, then, to that extent the provision of such benefits should not be considered as compensation to the employee but as the provision of improved conditions of work." 1976 CCH Stand. Fed. Tax Rep. ¶ 8907, at pp. 77,374-5.

The same document goes on to say:

> "The Internal Revenue Code as presently interpreted by the regulations and the better reasoned case law requires more than a finding that an employee enjoyed an economic benefit. Section 61(a)(1) of the Code speaks of 'compensation *for* services'." Id. at 77,375. (Emphasis in the original.)

The extensive litigation about police meal allowances reveals that such allowances are commonly regarded as "a proper responsibility" which state police departments "should supply for employees as a condition of employment wholly apart from the compensation for their work." In *Saunders*, it was so held two decades ago in what the trial

court in this case described as "circumstances not substantially different from those involved in the instant case." (Pet. App. A, p. 9A.)

The petitioner's implication (Pet. p. 8; Pet. Br. p. 29) that state troopers are in no different situation from "the majority of working people" (Pet. Br. p. 32) with regard to their conditions of employment appears to be predicated on the convenient omission from his Statement (Pet. Br. pp. 2-7) of all the Tax Court's findings of fact (Pet. App. A, pp. 5A-7A) with respect to the long consecutive hours of strenuous and dangerous duty required of New Jersey state troopers. Unlike "the majority of working people," state troopers are employed by an arm of the State having direct responsibility for enforcement of the criminal law; they are issued firearms by the government; they are billeted in troop barracks; they are subject to court martial and criminal process for failure to perform their duties; they are instructed when and where they may eat; and they are called away from their meals to handle riots and other emergencies involving public safety. They do not have a "lunch hour." It is for these reasons that the court of appeals rejected in *Saunders* the "artificial distinction" (215 F.2d at 775) between military and civilian personnel proposed by the petitioner in that case, and it is for the same reasons that this Court should now reject any similarity between state troopers and 'the majority of working people" proposed by the petitioner in the present case. Since the decision below merely reaffirmed the *Saunders case,* decided in 1950, affirming will in no way "invite further attempts by employers to provide tax-free compensatory payments to employees to defray the costs of meals or other personal living expenses," as petitioner warns (Pet., p. 8).

On the contrary, if this Court rules in favor of the petitioner, it can reach such a decision only on the ground that cash subsistence allowances constitute gross income. Such

a ruling from the Supreme Court of the United States would invalidate Treasury Regulations, Section 1.61-2(b), which excludes from gross income the subsistence and quarters allowances of hundreds of thousands of personnel in the Armed Forces, Coast and Geodetic Survey and Public Health Service of the United States. This, in turn, would subject these allowances to federal income tax, thereby either eroding the benefit to the recipients, with a concomitant loss of morale, or requiring a significant increase in the amount of the allowances in order to give the recipients the same benefit, at enormous expense to the federal government.

It is immaterial that there has not been an individual accounting for meal expenses in the present case for the following reasons:

(i) There are approximately 900 troopers. Their duties cover the entire range of police activity. The State's policy is to rotate the assignments of troopers so as to make each trooper capable of dealing effectively with any type of police problem. The variety of the respondent's duties in 1970 is illustrative of the application of this State policy.

(ii) In these circumstances, the impracticality of providing meals to troopers at meal stations is not only obvious, but also historically proved by the State's abandonment of meal stations in 1949. Moreover, it would be 'an administrative monster to try to keep an accounting of what the men are doing" (Transcript [hereinafter Tr.] 69) and "highly impractical to . . . reimburse for meals after the fact" (Tr. 72).

(iii) Therefore, the State pays a flat subsistence allowance to troopers set at a level regarded as "adequate to feed them . . . on an overall basis" (Tr. 44). The meal allowance paid at the same rate to all state troopers, regardless of

length of service and regardless of the nature of their duties, is an averaging method selected by the State of New Jersy as the most administratively convenient way of providing the troopers with subsistence while on active duty. See Treas. Reg. Section 1.119-1(a)(2)(ii)(e). The allowance was clearly not like salary, for, as the Tax Court found (Pet. App. A, p. 7A), the respondent spent at least the amount of his allowance for meals while on active duty.

In the present case, the Tax Court found as facts that the "meal allowance was not intended to represent additional compensation" (Pet. App. A, p. 5A) and that the meal allowance "is in lieu of the furnishing of meals [the troopers] are required to eat while they are on active duty" (Pet. App. A, p. 5A). These statements constitute findings by the trier of the facts that the taxpayer's meal allowance was noncompensatory.

The hollowness of the petitioner's arguments for treating the meal allowance as compensation is ultimately revealed by his failure to claim that the lodging furnished to taxpayer for 200 nights during the taxable year constituted compensation.

2. The meal allowance was paid to the respondent by the State of New Jersey as his employer for the convenience of the employer.

The Tax Court's findings of fact in this case also establish without contradiction that the meal allowance was provided to the respondent and the other troopers for the convenience of the State Police. On this point, the petitioner's omissions from his Statement are especially egregious. The Tax Court found as follows:

> "Prior to July 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the state. In those instances where a trooper was unable to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the state. Despite various efforts at enforcing this system, it proved unsatisfactory. Troopers would have to leave their posts for approximately an hour and a half to eat these meals leaving their patrol areas unguarded. Efforts aimed at staggering these eating periods proved unworkable and drew complaints from the individuals in charge of the eating stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the state discontinued its meal operations and instituted a meal allowance system." (Pet. App. A, pp. 3A-4A.)
>
> "This system provided for a daily meal allowance for all members of the state police while they were on active duty." (Pet. App. A, p. 4A.)
>
> "This system was adopted to provide the state and the public with better police protection. It also proved to be a less expensive method of handling this problem." (Pet. App. A, p. 5A.)

Guidelines as to the circumstances under which meals will be regarded as furnished for the convenience of the employer are provided by Treas. Reg. Section 1.119-1(a)(2)-(ii). Among the circumstances mentioned are the following:

> ". . . when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period . . ." Treas. Reg. Section 1.119-1(a)(2)(ii)(a).
>
> ". . . when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes. . ." Treas. Reg. Section 1.119-1(a)(2)(ii)(b).
>
> ". . . when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period . . ." Treas. Reg. Section 1.119-1(a)(2)(ii)(c).

It is clear from Treas. Reg. Section 1.119-1(a)(2)(ii) that the presence of just one of the foregoing circumstances establishes that meals are furnished for the convenience of the employer. In this case, all of them are present. For example, the Tax Court found:

> "Under this system the troopers are expected to eat at a public eating place within their assigned patrol area. They must first check in with the officier in charge of the station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating and is subject to call during the eating period. Such calls are not an uncommon experience. Troopers are not permitted to accept any free meals." (Pet. App. A, p. 5A.)

Moreover, the meal allowance system was adopted because the meal station system was too time-consuming. (Pet. App. A, p. 4A).

Finally, the opinion of the Tax Court states that the respondent's

> "employer, the State of New Jersey, furnished the meal allowance to state troopers because it was more convenient to provide a meal allowance than to provide meals for these troopers . . ." (Pet. App. A, p. 12A.)

The only argument that the petitioner can muster in the face of these findings is the strained argument that, even though the State's entire system of regulating closely the time, place and other circumstances of troopers' meals was adopted for the convenience of the State, the State's convenience was not served by its ultimate act of making payment to the troopers in accordance with the system. If this analysis were valid, Section 119 itself would be a dead letter in its entirety, since every employer would find it more convenient to avoid bearing the cost of furnishing meals and lodging.

In sum, the Tax Court—the trier of the facts—found that the operative facts in this case squarely fit the convenience of the employer doctrine. As Judge Sterrett, the trial judge in the Tax Court, whose dissenting opinion was adopted by the court of appeals, stated:

> "Police are engaged in a unique occupation, one that deals with public safety—a line of work that by its very nature breeds emergencies at any time of day or night. The interests of the employer, the state, in furtherance of its responsibility for the public safety, demand that it require its troopers to eat when, where and for a duration that does not jeopardize the employer's responsibility to the public. The state adopted the meal allowance system to assist it in carrying out this responsibility. Surely this decision is within the employer's prerogative." (Pet. App. A, pp. 35A-36A.)
>
> "It is difficult to conceive of a situation where an employee must so clearly take his meals at the convenience of his employer." (Pet. App. A, p. 36A.)

C. The authorities cited by the petitioner confirm that the convenience of the employer doctrine authorizes the exclusion of a cash meal allowance from gross income.

The petitioner's assertion (Pet. Br., pp. 11-14) that decisions of this Court, particularly *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), preclude application of the convenience of the employer doctrine to this case cannot withstand scrutiny.

In *Glenshaw Glass*, this Court held that punitive damages for fraud and antitrust violations constituted gross income to the recipient on the ground that there was no evidence of Congressional intent to exempt such payments from the broad scope of "income" within the meaning of Section 22(a) of the Internal Revenue Code of 1939, the predecessor of Section 61(a) of the 1954 Code. The case

also held that Section 22(a) of the 1939 Code and Section 61(a) of the 1954 Code are identical in scope in defining "income." In a similar case decided on the same day, *General American Investors Co.* v. *Commissioner*, 348 U.S. 434 (1955), this Court held that "insider profits" recovered by a corporation under the federal securities laws were includible in the gross income of the corporation on the authority of *Glenshaw Glass*, the Court stating:

> "The reasons which dictated that result are equally compelling here. We see no significant difference in the nature of these receipts which might make that ruling inapplicable. . . . There is no indication that Congress intended to exempt them from coverage." (348 U.S. at 436.)

Far from undermining the authority of *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), these two cases would appear to reinforce its authority by holding that:

> (i) the meaning of the term "income" is the same in both the 1939 Code and the 1954 Code;
>
> (ii) the "nature of [the] receipts" must be examined to determine what constitutes "income"; and
>
> (iii) the Congressional intent must be examined to determine whether a given receipt is to be excluded from "income."

Since "income" has the same meaning in both the 1939 and 1954 Codes, the reasoning of *Saunders* is just as applicable to Trooper Kowalski's meal allowance for 1970 as it was to Trooper Saunders' meal allowance for 1950. Moreover, Congress has expressed in at least two ways its intent to exclude from gross income receipts in the nature of noncompensatory meal allowances paid for the convenience of the employer.

First, since 1920 Congress has repeatedly enacted Revenue Acts and has twice enacted and repeatedly

amended Revenue Codes defining income without limiting the scope of either such administrative rulings at O.D. 514, 2 Cum. Bull. 90 (1920), relating to supper money and quoted in full, *supra*, p. 12, or such cases as *Saunders* v. *Commissioner*, *supra*.

Second, the legislative history of Section 119, enacted in 1954, makes it clear that the taxability of cash allowances for meals continues to require analysis on a case by case basis. As stated above, Congress enacted Section 119 to provide a safe harbor within which meals might be furnished free of tax, even if they were compensatory, so long as the convenience of the employer was served. Congress intended to confine the operation of Section 119 to meals furnished on the business premises of the employer. Cash allowances continue in the position of having to meet both conditions of the judicially and administratively evolved test.

Thus, Congress has clearly evidenced its intent not to limit the common law convenience of the employer doctrine, and the petitioner has repeatedly implemented this policy in his rulings and regulations. The criteria of *Glenshaw Glass* and *General American Investors* have been met.

II.

IN THE ALTERNATIVE, THE MEAL ALLOWANCE PAID TO THE RESPONDENT BY HIS EMPLOYER IS EXCLUDED FROM THE RESPONDENT'S GROSS INCOME UNDER SECTION 119 OF THE CODE, WHICH PROVIDES SUCH AN EXCLUSION FOR (A) THE VALUE OF MEALS (B) FURNISHED BY THE EMPLOYER (C) FOR THE CONVENIENCE OF THE EMPLOYER (D) ON THE BUSINESS PREMISES OF THE EMPLOYER.

If this Court decides that the respondent's meal allowance is not an item of gross income under the convenience of the employer doctrine, as held by the court of appeals, the Court need not consider the application of Section 119 to this case. Section 119 (App., p. 2A) provides a specific exclusion from an employee's gross income for (A) the value of meals (B) furnished by the employer (C) for the convenience of the employer (D) on the business premises of the employer. However, since the petitioner has made an argument under Section 119 (Pet. Br. pp. 34-43), the respondent takes the alternative position that his meal allowance meets the requirements for exclusion from gross income imposed by Section 119.

A. The meal allowance, having been spent by the respondent entirely on meals, constituted the value of meals.

The statutory exclusion in Section 119 is for "the value of any meals." The statutory language does not require that meals be furnished in kind. On the contrary, the phrase "value of meals" would appear to include, in any ordinary meaning of the words, a subsistence allowance. Surely any restaurant patron regards the money that he hands the waiter or cashier after finishing his meal as the value of the meal, at least if he patronizes the restaurant more than once. It is well established, of course, that statutory language is to be read in its ordinary and commonly accepted sense. To treat a subsistence allowance as the value of meals comports not only with the plain language of Section 119, but also with the purpose of Section 119 where, as here, it is demonstrably impractical (if not wasteful and neglectful of the public safety) for the employer to provide meals in kind.

Moreover, if it is shown, as here, that a subsistence allowance is expended solely for meals, any distinction between

the subsistence allowance and the meals themselves for the purposes of Section 119 is artificial. The *Barrett, Morelan, Smith* and *Keeton* cases, *supra,* all held that subsistence allowances provided to state troopers qualify for the exclusion under Section 119, and in all these cases it was established that the subsistence allowances were actually expended for meals. The *Wilson, Koerner* and *Ghastin* cases, *supra,* all held that the subsistence allowances paid to the state troopers in those cases did not qualify for the exclusion of Section 119, but in none of those cases was it established that the subsistence allowance was used exclusively for meals. Although both the regulations and the committee reports that discuss Section 119 state that the Section applies only to meals furnished in kind, these blanket statements are inconsistent with the statutory language and purpose where, as here, a subsistence allowance is the only practical means for the employer to provide its employees with meals required in connection with the employees' duties and where, as here, the subsistence allowance has actually been expended solely for the purpose intended by the employer.

The petitioner's assertion (Pet. Br. p. 37) that the term "value" is not used in the Internal Revenue Code to include cash is not correct. Its inaccuracy is demonstrated by Sections 2031 and 2051 of the Code, defining the gross estate and taxable estate of a decedent solely by use of the term "value" in a context that obviously includes cash. Moreover, Section 107 itself, cited by the petitioner, includes both housing and cash housing allowances under the umbrella of its title "Rental Value of Parsonages". See also Section 102(a), which excludes from gross income "the value of property acquired by gift, bequest, devise, or inheritance."

The irrelevance of former Section 120, repealed in 1958, has been shown previously, *supra,* p. 16.

B. The meal allowance was furnished by the respondent's employer.

Since the respondent's meal allowance was provided to him by his employer, the respondent has met the requirement of Section 119 that the value of meals be furnished by the employer.

C. The meal allowance was furnished for the convenience of the respondent's employer.

The fact that the respondent's meal allowance was provided to him for the convenience of his employer need not be belabored here, since it has been discussed and established earlier in this brief (pp. 26-29).

D. The meals for which the meal allowance was paid were furnished on the business premises of the respondent's employer.

The respondent's meal allowance also meets the statutory requirement that the meals be furnished on the business premises of the employer. It should be noted that this test of clause (1) of Section 119 merely requires that the meals be furnished on the business premises of the employer. This test does not require that the meals be furnished by the employer. It is only the value of the meals that must be furnished by the employer. In the present case, the jurisdiction of the New Jersey State Police, an official arm of the State of New Jersey, extends throughout the entire State. (Pet. App. A, p. 3A) Therefore, as stated in *Barrett*:

> "The Commissioner takes too narrow a view of what constitutes the 'business premises' of the Mississippi Highway Patrol. The major 'business' of this state law enforcement agency is obviously not confined to isolated station houses; rather, it covers every road and highway in the state twenty-four hours a day every day. In view of the special nature

> and functions of the highway trooper's work, it is unrealistic to treat the employer's place of business as limited to the state patrol headquarters. This criterion, therefore, is not decisive against the excludability of the sums here in question." 321 F. 2d at 912.

This interpretation is consistent with the purposes of Section 119, since it would be impractical, expensive and counterproductive to the business of the State Police for the statute to require that meals be furnished to state troopers at meal stations. This interpretation is also consistent with Treas. Reg. Section 1.119-1(c)(1), which provides in relevant part as follows:

> "For purposes of this section, the term 'business premises of the employer' generally means the place of employment of the employee. For example, . . . meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the the employer."

The cowhand example was derived from Conf. Rep. No. 2543, 83d Cong., 2d Sess. 27 (1954), which extended the scope of the example to meals furnished "on national forest land used under a permit". See also *Lindeman* v. *Commissioner*, 60 T.C. 609 (1973), where the Tax Court held that, for purposes of Section 119, the "business premises of the employer" included "the perimeter of the business premises" of the employer. (60 T.C. at 612). A restaurant within the immediate area of a trooper's active duty assignment must surely be regarded as within the "perimeter" of his place of employment.[7]

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7. The question of the definition of the term "business premises of the employer" was not reached in *Ghastin, supra*. In *Wilson, supra*, the court's holding that meals were not furnished on the "business premises of the employer" was apparently based on its finding that the trooper was off duty while eating. In the present case, the taxpayer was on active duty during meals, and he was responsible for general law enforcement, not merely traffic patrol.

The petitioner argues (Pet. Br. p. 35) that the requirements of Section 119 as to the form in which meals are provided—cash or kind—and the place where meals are provided—the employer's business premises—are interrelated in order to "keep the employees close to their assigned work place and promote greater efficiency." If this purpose can be served only by providing a cash meal allowance to be expended at a public restaurant, the statutory purpose can be served only by excluding such an allowance from the employee's gross income. State police officers are not clerical employees who are given a lunch hour to be devoted to personal pursuits of the employee's choice, whether eating, shopping or just loafing. State police officers are continuously on duty. The New Jersey State Police does not permit troopers' meals to interfere with the performance of their duties. New Jersey State Police Troopers eat only when and where they are given specific permission to do so—often at a roadside diner in the middle of the night. The State of New Jersey instituted its meal allowance system precisely to avoid loss of time in traveling to and from meals. (Pet. App. A, p. 4A.)

The petitioner's contention in this case that the respondent's meal allowance cannot be excluded from gross income under either the convenience of the employer doctrine embodied in Section 61 or the safe harbor provisions set forth in Section 119 is not tenable. On one hand, the petitioner postulates that the convenience of the employer doctrine has been confined exclusively to Section 119 since its enactment as part of the Internal Revenue Code of 1954. On the other hand, he premises that cash allowances cannot qualify for exclusion from income under Section 119. The logically necessary conclusion from these premises is that cash allowances cannot qualify for exclusion from income under any circumstances. Yet, petitioner's own rulings (*e.g.*, O.D. 514. 2 Cum. Bull. 90) and Treasury Regulations [Sections 1.61-

2(b) and 1.119-1(c)(2)] provide for the exclusion of cash meal allowances. Moreover, there is nothing in the legislative history of Section 119 to suggest that cash meal allowances cannot qualify for exclusion from income. To the contrary, the Senate Finance Committee Report cited and quoted by petitioner (Pet. Br. p. 10) makes it clear that cash meal allowances received by an employee are "includible in gross income only to the extent that such allowances constitute compensation." S. Rep. No. 1622, *supra*, pp. 190-191. Since petitioner's argument defeats itself, the court of appeals' analysis of the law applicable to this case is irrefutably correct, unless the respondent alone is to be given full authority to construe the Internal Revenue Code.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed. Respondent also requests an award of attorney's fees pursuant to 42 U.S.C. Section 1988, 90 Stat. 2641.

Respectfully submitted,

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JULY 1977.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. **Gross Income Defined**

(a) **General Definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

(b) **Cross References.—**

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

SEC. 119. **Meals or Lodging Furnished For the Convenience of the Employer**

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if:

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

Sec. 1.61-2 Compensation for services, including fees, commissions, and similar items

(a) In general. (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination of severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

• • •

(b) Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service. Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income. • • •

Sec. 1.119-1 Meals and lodging furnished for the convenience of the employer

(a) Meals—(1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) Meals furnished without a charge. (i) Meals furnished by an employer without a charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the

meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances. In subdivision (ii) of this subparagraph, there are set forth some of the substantial noncompensatory business reasons which occur frequently and which justify the conclusion that meals furnished for such a reason are furnished for the convenience of the employer. In subdivision (iii) of this subparagraph, there are set forth some of the business reasons which are considered to be compensatory and which, in the absence of a substantial noncompensatory business reason, justify the conclusion that meals furnished for such a reason are not furnished for the convenience of the employer. Generally, meals furnished before or after the working hours of the employee will not be regarded as furnished for the convenience of the employer, but see subdivision (ii) (d) and (f) of this subparagraph for some exceptions to this general rule. Meals furnished on nonworking days do not qualify for the exclusion under section 119. If the employee is required to occupy living quarters on the business premises of his employer as a condition of his employment (as defined in paragraph (b) of this section), the exclusion applies to the value of any meal furnished without charge to the employee on such premises.

(ii) (a) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer

when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

(b) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period. For example, meals may qualify under this subdivision when the employer is engaged in a business in which the peak workload occurs during the normal lunch hours. However, meals cannot qualify under this subdivision (b) when the reason for restricting the time of the meal period is so that the employee can be let off earlier in the day.

(c) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (c) when there are insufficient eating facilities in the vicinity of the employer's premises.

(d) A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a sub-

stantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.

(e) If the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished to each other employee will also be regarded as furnished for a substantial noncompensatory business reason of the employer.

(f) If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to such employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason.

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

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(c) **Rules**. (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals and lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

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